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FEDERAL COMMUNICATIONS COMMISSION REPORTS
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Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

DEAN BURCH, Chairman

ROBERT E. LEE
NICHOLAS JOHNSON
H. REX LEE
CHARLOTTE T. REID
RICHARD E. WILEY
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F.C.C. 73-740

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PETITION FOR RULEMAKING FILED BY MR. FRANK KINGSTON SMITH TO ALLOW MORE THAN ONE AERONAUTICAL ADVISORY STATION AT A LANDING AREA	RM 2096

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 2, 1973)

BY THE COMMISSION:

1. The Commission has before it a petition for rule making (RM 2096) from Mr. Frank Kingston Smith, President of the National Aviation Trades Association, Washington, D.C., to amend § 87.251 of the rules to allow the licensing of more than one aeronautical advisory station (UNICOM) at a landing area to be served. Comments from the Aircraft Owners and Pilots Association (AOPA) were received in response to the public notice of the Smith petition, wherein it disagrees with the petition and recommends that it be rejected.

2. The Commission, since the inception of the aeronautical advisory service, has retained the limit of one aeronautical advisory station to a landing area. This restriction has been considered necessary from the standpoint of aviation safety. The Radio Technical Commission for Aeronautics (RTCA)[1] specifically treated this matter in its report prepared by SC-113. The pertinent part of the report reads as follows:

> The consideration of more than one station at a landing area poses fundamental but unresolved problems of: who will be primarily responsible for answering incoming calls; the legal complications which can develop should contradictory information be issued a pilot on safety of flight matters such as field or runway conditions which would lead to an accident; and the technical problems of interference, all lead to the conclusion that more than one station at a landing area should not be considered.

The petitioner urging deletion of this restriction has not presented any information which justifies abandoning this long-standing concept.

3. In view of the foregoing, we find that the rule change requested and indicated by petitioner Smith to be necessary is not desirable and would not serve the public interest, convenience or necessity. Accordingly, IT IS ORDERED, That the Petition of Mr. Frank Kingston Smith is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1]The RTCA is a cooperative association of United States Government-Industry aeronautical telecommunications agencies. It conducts studies of aeronautical telecommunication problems and related matters.

F.C.C. 73-681

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of AMERICAN TELEPHONE & TELEGRAPH Co. (A.T. & T.) For Authority Under Section 214(a) of the Communications Act of 1934, as Amended, To Supplement Existing Facilities Between Boston, Mass.; Chicago, Ill.; New York, N.Y.; Philadelphia, Pa.; and the District of Columbia By Establishing Digital Channel Groups Between the Above Cities on the Existing Microwave Radio Channels	File No. P-C-8490

MEMORANDUM OPINION AND ORDER

(Adopted June 21, 1973; Released July 2, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; REID AND WILEY CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER JOHNSON JOINS.

1. We have the above-captioned application before us whereby AT&T seeks authority to supplement its existing facilities by the installation of Digital Channel Groups (digroups) between the above-named five cities. The digroups, which will transmit digitally at a maximum rate of 1.544 megabits per second (Mb/s), would be established through the addition of appropriate terminals and multiplex equipment to existing radio channels, utilizing a newly developed technique known as Data Under Voice (DUV). By this technique, a digital bitstream will be transmitted in an otherwise unused portion of the band width on 4 and 6 GHz microwave radio channels.

2. AT&T plans to use the requested facilities to provide service over a new system that will be physically integrated but functionally discrete from existing facilities. The new system is to be known as the Digital Data System (DDS) which will provide to the public private line facilities for the digital transmission of data on a full duplex, synchronous basis. AT&T claims that DDS will provide: (1) improved performance characteristics, such as lower error rates; (2) improved reliability through in-service monitoring, automatic switching to standby channels, and comprehensive remote testing; and (3) increased efficiency in the use of spectrum and existing facilities and simpler station equipment. AT&T also claims that the use of the DUV

technique will result in lower costs in that the estimated cost to construct the DUV initial facilities is $1.32 million compared to $2.20 million for equivalent analog capacity.

3. AT&T informs us that, although this application for DUV facilities and DDS service initially relate only to the stated five cities, it is AT&T's intention to expand the DUV facilities and DDS service by stages to 96 cities by 1976 and that AT&T will file appropriate applications therefor from time to time in the future. Furthermore, in addition to the planned uses of DUV facilities for DDS, AT&T asserts that the requested facilities are also capable of economically and efficiently providing other services, such as the presently offered Series 8000 (50 kilobit) channels and Data-Phone 50 channels and that other uses may be developed in the future.

4. We have received a number of objections to a grant of this application. Petitions to Deny or Dismiss were filed by the Data Transmission Company (Datran), and by three MCI carriers (MCI), and comments were received from the Independent Data Communications Manufacturers Association (IDCMA), Southern Pacific Communications Company, Eastern Microwave, Inc., and Western Tele-Communications, Inc. (WTCI) raising certain questions about the application. In addition we received comments from the Office of Telecommunications Policy urging a grant of the application subject to certain preconditions related to cost allocations, pricing, freedom of access, interconnection and re-sale.

5. However, except as indicated in paragraph 6 hereof, we are not now ruling on either the objections to this application or the preconditions recommended by OTP. We conclude that the public interest, convenience and necessity will be served by authorizing AT&T at this time to construct the requested facilities with the requirement that further application shall be made and prior approval obtained from the Commission before AT&T may commence commercial operations over such facilities. AT&T estimates that it will take about nine months to complete such construction. At any time prior to completion of construction, AT&T may submit its definitive data showing the existing or proposed services for which the facilities are to be used, the specific rate and tariff provisions to be applicable to such services, including all regulations regarding shared use and re-sale of such services and interconnection with such services. In addition, the showing shall include all cost and supporting data. Interested parties will have an opportunity to comment thereon. Thus, the Commission will be in a more informed position to take timely action on AT&T's application to operate, to the end that there will be no undue delay after construction is completed in activating the facilities as approved by the Commission. Moreover, we expect to initiate a general proceeding in the near future designed to establish regulatory policies with regard to the shared use and re-sale of common carrier services and facilities. At the time we consider the application for authority to operate the requested facilities, we will take account of any unresolved policy questions with respect to shared use and re-sale which are the subjects of the aforementioned proposed rule-making, as well as any decisions that will have been reached in Dockets 18128/18684, involving ap-

propriate rate-making principles and guidelines, and Dockets 19528, 19419 and 19691, involving interconnection.[1]

6. Datran, in its pleadings, raises questions as to whether utilization of the "DUV" technique is an efficient use of the radio spectrum and whether AT&T shouldn't be limited to voice, as opposed to data, in the transmission of intelligence in this portion of the baseband. However, we are of the view that by the use of "DUV", AT&T should be able to insert the digitally encoded information on the lower portion of the baseband that is not suitable for occupancy by analog channels; that this technique will permit the transmission on a single microwave channel of 1.544 Mb/s of data, in addition to 1200–1800 voice circuits, at no increase in radio spectrum use; that data transmission over this portion of the baseband would be a more efficient and economical utilization of this frequency space than would the use of this same space for the provision of a limited number of voice channels; and that a significant portion of the data now transmitted on analog facilities could be shifted to DDS, thus, making the analog channels otherwise used for data, available for voice use. Accordingly, we reject Datran's objection in this regard and conclude that the basic DUV technology is sound and should be introduced into the plant and operations of the AT&T network subject to further review and action by the Commission upon completion of construction.

7. We find and conclude that the present and future public interest, convenience and necessity will be served by a grant of AT&T's application to construct the facilities in question provided that, as set forth in the preceding paragraphs, further approval of the Commission is obtained prior to commencing commercial operation of such facilities.

8. Accordingly, IT IS ORDERED, That AT&T IS HEREBY AUTHORIZED, to construct the facilities as proposed in the above-captioned application.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER H. REX LEE IN WHICH COMMISSIONER NICHOLAS JOHNSON JOINS

The American Telephone and Telegraph Company seeks authority under Section 214 of the Communications Act to supplement its existing facilities by establishing Digital Channel Groups between Boston, Chicago, New York, Philadelphia and Washington. AT&T plans to use digital transmission techniques for the intercity relay of digital signals, and its Section 214 application represents the first step in the initiation of a nationwide end-to-end Digital Data System (DDS), which will be physically integrated with, but functionally discrete from, existing Bell System facilities. Initially, digital transmission

[1] Since we are not prepared to authorize commercial operations of the facilities involved, our action is not inconsistent with our *Report and Order* of February 3, 1973 in Docket No. 19117, et al., wherein we indicated that, as a general rule, it would be possible for new services to be offered by new tariff filing "over duly authorized facilities." 39 FCC 2d 131; 135 (1973).

will be provided on DDS, utilizing a newly-developed technique known as Data Under Voice (DUV), which converts a digital bitstream into a form suitable for transmission in an otherwise unused portion of the bandwidth on existing 4 and 6 GHz microwave radio channels and which will not displace any voice channels presently provided via analog transmission.

AT&T claims that the new system will result in the more efficient and economic utilization of existing facilities and will improve service to those segments of the data industry which have need for data-only communications service. It asserts that the use of digital transmission facilities will permit the replacement of complicated analog modems by less costly station equipment, will offer data customers a more efficient and reliable method of handling their service requirements, will facilitate the rapid and extensive utilization of portions of radio spectrum not used before and will introduce improved performance characteristics, additional service features and a variety of data speeds. AT&T states that it intends to submit further applications for authorization to extend its digital data network to 96 cities by 1976, a development, which it claims, was anticipated by the Commission in its *First Report and Order on Specialized Common Carrier Services in Docket No. 18920*, 29 FCC 2d 870, 912 (1971). In support of its proposal, AT&T submits a construction cost summary and illustrative tariff rates and regulations and advises that cost and market studies to determine appropriate rate levels and structures for the new service are underway and will form the bases for tariff revisions to be filed with the Commission. Petitions to deny or dismiss the AT&T application were filed by the Data Transmission Company and by three MCI Carriers, and comments on the proposal were received from the Southern Pacific Communications Company, Eastern Microwave, Inc., the Independent Data Communications Manufacturers Association, Western Tele-Communications, Inc., and the Office of Telecommunications Policy.

With the exception of Datran's questions as to whether utilization of the DUV technology represents an efficient use of radio spectrum and whether AT&T should be limited to voice transmission in this portion of the baseband, the majority does not rule on either the objections raised to the DDS proposal or the recommendations made by OTP. Rather, the majority concludes that AT&T should be authorized to construct the requested facilities immediately subject to the requirement that "further application shall be made and prior approval obtained from the Commission before AT&T may commence commercial operations over such facilities." The majority then suggests that AT&T may submit "definitive data" concerning costs, the existing or proposed services to be provided over the facilities and the specific rate and tariff provisions to be applied (including regulations regarding the shared use and resale of such services and interconnection with such services) at any time prior to the completion of construction. In this way, the majority reasons, it will be in a better position to evaluate the DDS proposal and to determine under what conditions AT&T should be authorized to provide digital data service, and there will be no undue delay in activating the facilities. The ma-

jority also points out that the Commission expects to initiate a proceeding in the near future to establish policies concerning the shared use and resale of common carrier services and facilities and that when it considers AT&T's application for operational authority, it will take account of any such unresolved policy questions as well as any decisions reached in existing proceedings involving appropriate rate-making principles for the Bell System (Docket Nos. 18128/18684) and interconnection (Docket Nos. 19528, 19419, and 19691).

While I welcome the innovative use of existing AT&T facilities to provide a needed data communications service and I appreciate the majority's desire to avoid undue delay in the provision of such service, I cannot concur in the premature decision to approve construction of the proposed facilities. AT&T's Section 214 application is in no sense a routine request for authority to supplement existing facilities—it represents the first step in an ambitious plan to provide a new service on a nationwide basis in response to the competitive challenge of the specialized common carriers. As such, the proposal raises serious policy implications which should be addressed by the Commission before any construction authority is granted. Of paramount importance is the impact of such a service offering by the Bell System on the competitive environment sought to be established by the Commission for the specialized communications market. While the decision in Docket No. 18920 did affirm AT&T's ability to compete in the data communications market and our desire not to delay the institution of new specialized services by existing or new carriers pending the outcome of Docket No. 18128, I do not interpret those conclusions to mean that the Commission has no continuing obligation to ensure that the policy objectives of full and fair competition are not defeated by particular carrier activity. Moreover, the Commission has recognized its obligation on several occasions since the issuance of its *Specialized Common Carrier Services* decision. For instance, in our policy pronouncements on domestic satellite facilities in Docket No. 16495 (35 FCC 2d 844; 38 FCC 2d 665 (1972)), we imposed restrictions on AT&T's initial use of satellite technology to provide specialized services, premised on the fact of AT&T's domination of the domestic communications market and the resulting potential for cross-subsidization of its competitive offerings by its monopoly telephone services. More recently, in our *Report and Order in Docket No. 19117*, 39 FCC 2d 131 (1973), while we declined to impose a requirement for prior Commission approval of new or revised service offerings by existing or new carriers, we did indicate our intention to take corrective action in the face of carrier behavior that appears designed to thwart the realization of our policy objectives in Docket No. 18920.

Since DDS is a new service offering proposed by AT&T as its competitive response to the specialized carriers and could have a substantial impact on the course of competition in the data communications market, the Commission should be fully informed of the dimensions of the challenge. It should require the submission by AT&T of further information about the DDS proposal, including market and cost studies, revenue projections, rate-making principles, effect on existing services and regulations governing access to the carrier's data services,

including shared use, resale and interconnection. As the Office of Telecommunications Policy points out in its comments, the Commission should assure itself that the tariffs to be applied by AT&T are based on substantiated real costs and are not cross-subsidized and should be aware of the effect of pricing alternatives on competition and technological innovation in the specialized services industry. In this regard, it is interesting to note that as a result of staff approval on August 24, 1972, of the first DUV facility for data transmission on microwave radio channels between Chicago and New York, the Chief of the Common Carrier Bureau directed two separate and detailed letter inquiries to AT&T concerning its proposed use of the DUV technique for a nationwide digital transmission system. The inquiries were made to facilitate the staff's future processing of construction permit applications and covered such matters as the nature of the service, transmission techniques, rate-making principles, cost-allocations, proposed rates, rate of return, interconnection of customer-provided facilities, shared, joint or authorized use of DDS, etc. AT&T's responses to the staff inquiries were not filed until after its present Section 214 application was submitted to the Commission on October 30, 1972. Nevertheless, in spite of the staff inquiries, AT&T's responses and the serious objections raised by several parties, the majority authorizes the first segment of the DDS network without addressing the policy implications inherent in the AT&T proposal.

While I do recognize the distinction that AT&T attempts to make between Section 214 certification of facilities and tariff-related proceedings in terms of the justification to be supplied by the carrier and considered by the Commission and I am aware that the majority has, in effect, imposed requirements of further application and prior approval to elicit additional information from AT&T, I cannot join in the majority's decision. The fact remains that AT&T will be permitted to construct facilities for the first segment of its digital data network *before* the Commission has an opportunity to consider the serious questions raised by the proposal, including whether DDS could impinge on the viability of the *Specialized Common Carrier Services* decision. Moreover, it is unlikely that the several proceedings involving rate relationships among AT&T's interstate services (including whether the contribution by each service to the total earnings should be measured by fully distributed or long-run incremental costs) and interconnection will be resolved before the Commission is faced with additional DDS construction applications and AT&T's request to activate its first segment. While I do not intend to prejudge the outcome of those proceedings, the fact remains that the AT&T proposal raises the possibility of unfair competition in the form of cross-subsidization and predatory pricing (through use of long-run incremental cost allocations). Therefore, the Commission should employ the flexible procedures permitted under Section 214 to obtain the necessary information for a reasoned determination about the impact of AT&T's DDS proposal *before* any authorization is approved. In my own view, the Commission will be faced with severe pressure to grant operational authority once the facilities are constructed, especially if AT&T, in the interim, seeks further authority to extend its digital data network.

With that all said, I must again disclaim any intention to forestall or delay the initiation of data communications service by AT&T or to undercut the approach adopted in Docket No. 18920 by unnecessarily protecting the entry of new carriers in the competitive services market. I am concerned, as Chairman Burch was in the context of the domestic satellite proceeding, that a truly competitive environment does exist in which both new and existing carriers have the opportunity to demonstrate their ability to market specialized services. If I can be reasonably assured that the DDS proposal is based on compensatory rates and provides for non-discriminatory and non-restrictive access to, and use of, AT&T facilities, then I will be content to permit market forces to regulate the course of specialized services and the fate of all carriers. However, if the Commission approves construction of facilities by AT&T in the absence of adequate information about the DDS proposal and without addressing the major issues involved, I fear that we will be hard pressed to maintain the integrity of the policy objectives so highly touted in our 1971 decision.

For these reasons, I must respectfully dissent.

F.C.C. 73-689

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO., LONG LINES DEPARTMENT Revisions of Tariff F.C.C. No. 260 Private Line Services, Series 500 (TELPAK)	Docket No. 18128
AMERICAN TELEPHONE & TELEGRAPH CO. Revision of American Telephone & Telegraph Co. Tariff F.C.C. No. 260 Series 6000 and 7000 Channels (Program Transmission Services)	Docket No. 18684

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 2, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND REID DISSENTING; COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. The Commission has before it a petition filed by the American Telephone and Telegraph Company (AT&T) requesting separation of the Docket No. 19129 Trial Staff [1] from the decision making process in Docket Nos.[2] 18128 and 18684 on the ground that its impartiality herein has been vitiated by its arguments in Docket No. 19129. Air Transport Association of America, United Air Lines, Inc., and Eastern Air Lines jointly submitted a statement in support of AT&T, and Microwave Communications, Inc. filed an opposition, to which AT&T replied.

2. AT&T recently submitted proposed interim rate adjustments in its MTS and WATS services for the purpose of improving its total interstate earnings posture to the level we allowed as reasonable in Docket No. 19129.[3] We permitted AT&T to file these interim rates [4] upon 10 and 60 days notice, respectively, withholding judgment on their lawfulness pending the outcome of Docket No. 18128 and Phase II of Docket No. 19129. At the same time, we denied the Trial Staff's request to reject or set aside the rates. Our decision in Docket No. 18128 will resolve the appropriate earnings and rate relationships among AT&T's interstate services, and will determine whether the contribution by each service to total earnings should be measured by fully dis-

[1] We have separated the Staff of the Common Carrier Bureau from the decision making process in Docket No. 19129, but have provided for it a decisional role in Docket No. 18128. 27 FCC 2d 151 (1970); 25 FCC 2d 835 (1970).
[2] Reference hereinafter to Docket No. 18128 will embrace Docket No. 18684.
[3] 38 FCC 2d 213 (1972).
[4] 38 FCC 2d 984 (1973).

tributed or long run incremental costs.[5] AT&T contends that the Trial Staff predicated its evaluation of the proposed interim rates upon fully distributed costs, thereby reaching a conclusion on this costing approach, and obviating its objectivity with respect to the evidence in Docket No. 18128 on cost methodologies.

3. We deny AT&T's petition, as we denied[6] its previous request for separation, for we believe that the Trial Staff has not compromised its objectivity on the issues in Docket No. 18128 by reason of its participation in Docket No. 19129. The Trial Staff urged in Docket No. 19129 that the interim rate adjustments not be imposed exclusively upon MTS and WATS, but rather be spread proportionately among all services. AT&T had predicated its distribution of the rate increase in part upon a judgment that the private line services furnished an appropriate contribution to system wide revenue requirements, calculated by long run incremental costs (LRIC), and therefore should not be charged with a portion of the interim increase. The Trial Staff argued that inasmuch as the utility of LRIC has not yet been resolved by Docket No. 18128, the Commission should direct AT&T to allocate the increase in proportion to the earnings of the relative services measured, as we have done traditionally[7] on a fully distributed cost standard. In essence, the Trial Staff analyzed the allocation of the interim rate increases in terms of traditionally measured earnings relationships, pending the decision in Docket No. 18128 on the proper costing standard. The Trial Staff did not express a position on the methodological issue of Docket No. 18128, and we decline to order its separation.[8]

4. Accordingly, IT IS ORDERED, That the petition of AT&T is DENIED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

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[5] 32 FCC 2d 522, 524 (1972).
[6] 32 FCC 2d 89 (1971).
[7] *Report of Domestic Telegraph Investigation,* Docket No. 14650, pp. 200–204 (1966).
[8] We do not reach the question of the potential impact on the Trial Staff's decisional status had it taken a position on the Docket No. 18128 issues.

F.C.C. 73-701

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF BREMEN RADIO CO., LICENSEE OF
RADIO STATION WWCC, BREMEN, GA.
For Forfeiture

MEMORANDUM OPINION AND ORDER
(Adopted June 27, 1973; Released July 5, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (a) its Notice of Apparent Liability, dated April 5, 1972, notifying Bremen Radio Company, licensee of Station WWCC, Bremen, Georgia, of its apparent liability for a forfeiture of three thousand dollars ($3,000); (b) Bremen's response to the Notice submitted by its counsel under date of June 27, 1972; (c) a Commission letter to the licensee dated October 31, 1972; (d) the licensee's response to that letter dated November 7, 1972; (e) the Commission's Memorandum Opinion and Order adopted January 17, 1973 ordering that the licensee forfeit to the United States the sum of three thousand dollars ($3,000), and (f) an application for remission or mitigation of forfeiture filed by the licensee under date of February 22, 1973.

2. The Notice of Apparent Liability was issued pursuant to Section 503(b)(1)(D) of the Communications Act of 1934, as amended for violation on November 16, 17, 18 and 19, 1971 of Section 509(a)(4) of the Communications Act by broadcasting or participating in the broadcasting of a radio program, knowing or having reasonable ground for believing that, in connection with a purportedly bona fide contest of chance, constituting a part of such program, one or more persons with intent to deceive the listening public had engaged in an artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of such purportedly bona fide contest of chance as proscribed by Section 509(a)(3) of the act. The purportedly bona fide contest of chance in this case was a "turkey shoot" contest. In our Memorandum Opinion and Order of January 17, 1973, we considered the licensee's response to the Notice and found that the licensee had violated Section 509(a)(4) of the Act. Since the facts of the case and the licensee's original pleadings were set forth fully in the Memorandum Opinion and Order, they will not be repeated here.

3. In its application for remission or mitigation of forfeiture, the licensee attributes "the alleged offense" to its employees and states that "the only basis for levying a forfeiture is to allege the Management's

responsibility for the acts of its employees." The licensee states that "the alleged offense, while serious, is not as flagrant a violation of the Act as are other provisions of Section 503, and the amount of the forfeiture should be remitted in its entirety or drastically reduced in view of all of the evidence and circumstances of the instant case." One of licensee's arguments for remission or mitigation is that the proposed forfeiture is excessive in light of the small size of the station and its income. It states that the proposed forfeiture would amount to the station's net income after taxes for fiscal years 1971 and 1972 combined. It contends that "In view of the doubtful nature of any intent on the part of Management, the forfeiture is extremely excessive," pointing out that the Commission here levied the maximum amount of $1,000 per day for the violation although it was empowered to impose a lesser forfeiture.

4. The licensee acknowledges that in the Notice of Apparent Liability the Commission offered the licensee an opportunity for an evidentiary hearing in light of certain contradictions between statements made by present and former employees of the station, on the one hand, and the manager-vice-president-director-part-owner, on the other, but the licensee states that it did not request a hearing because it was advised that the expense of such a hearing "would be almost as much as the proposed forfeiture," and the "licensee was not financially able to bear such expense and felt strongly that its response to the Notice of Apparent Liability would convince the Commission of the lack of intent on the part of Management to violate any section of the Communications Act." The licensee states that it felt that "the doubtful nature of the evidence against it would compel the Commission to find in its favor, or in the alternative, to impose a minimum forfeiture within the ability of the Licensee to pay."

5. We have considered the application for remission or mitigation of the forfeiture, as well as the information obtained during the Commission's investigation and the licensee's previous responses, and we are not persuaded to remit or reduce the forfeiture. We considered the finances of the station before issuing the Notice of Apparent Liability and our Memorandum Opinion and Order for forfeiture, and find no reason to alter our prior determination on financial grounds. We also have considered previously the denial of Mr. Thaddeus K. Brown, the manager, vice-president, director and part owner of the licensee, that he ordered that the contest be rigged or was aware of the manner in which it was being conducted. However, we have repeatedly held that licensees are responsible for acts of their employees and Mr. Brown gave full responsibility and authority to his program director, Mr. Larry Wayne, to prepare the materials used in the contest and to oversee the manner in which the contest was conducted. Mr. Wayne acknowledges that he was aware that there could be only one winner of the contest per day, although it was broadcast at least ten times daily and listeners were led to believe that they might win each broadcast of the contest even when a winner already had been declared on that day. Thus, we do not regard the evidence in this case as of a "doubtful nature," as the licensee claims.

6. In view of the foregoing, IT IS ORDERED, That the application for remission or mitigation of forfeiture filed by Bremen Radio Company IS DENIED, and that, pursuant to Section 503(b)(1)(D) of the Act, Bremen Radio Company, licensee of Station WWCC, Bremen, Georgia, forfeit to the United States the sum of three thousand dollars ($3,000) for violation of Section 509(a)(4) of the Communications Act. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of the Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Bremen Radio Company, licensee of Station WWCC, Bremen, Georgia.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-604

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TONY P. CONGUISTA, CLEVELAND, MISS. For Renewal of License of Station WDSK	BR-3735

JUNE 6, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

MR. TONY P. CONGUISTA,
Radio Station WDSK,
Cleveland, Miss.

DEAR MR. CONGUISTA: This refers to your application for renewal of license of Station WDSK, Cleveland, Mississippi (BR-3735).

WDSK was granted a short-term license renewal for the period ending June 1, 1973, because of your failure to exercise adequate supervision over the station's operations. We have reviewed your operation during the short-term renewal period, and find no evidence of any of the conduct for which the short-term license renewal was granted. We further find that you are legally, technically, financially, and otherwise qualified to be a licensee and that a grant of your present application would serve the public interest, convenience and necessity.

Accordingly, the application for renewal of license for Station WDSK, Cleveland, Mississippi, is granted for the renewal period of Mississippi stations—i.e., June 1, 1976.

Commissioner Nicholas Johnson concurred in the result.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Equal Employment Opportunities Inquiries Sent to Selected Stations in Arkansas, Louisiana, and Mississippi

JUNE 19, 1973.

THE COMMISSION, BY COMMISSIONERS BURCH (CHAIRMAN), H. REX LEE, REID AND WILEY, WITH COMMISSIONER HOOKS CONCURRING, AND COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT, ISSUED THE FOLLOWING NEWS RELEASE: EEO INQUIRIES SENT TO SELECTED STATIONS IN ARKANSAS, LOUISIANA, AND MISSISSIPPI.

Equal employment opportunity (EEO) inquiries have been sent to 19 stations in Arkansas, Louisiana and Mississippi following a review of their 1971–72 Annual Employment Reports (FCC Form 395). The license terms for these stations expired June 1, 1973.

The stations selected for review had more than ten fulltime employees, but no fulltime women employees, or showed a decline in their number. In areas with minority populations of 5 percent or more, they employed no fulltime members of minority groups or showed a decline in this category.

These are the same criteria used when the Commission reviewed the EEO programs of licensees in Delaware, District of Columbia, Florida, Maryland, North Carolina, Pennsylvania, South Carolina, Virginia, West Virginia, Alabama and Georgia.

The Commission deferred action on the renewal applications of the following stations, pending resolution of the inquiry.

KLRA, Little Rock, Ark.
KSLO, KSLO–FM, Opelousas, La.
KTLO, KTLO–FM, Mountain Home, Ark.
KXLR, North Little Rock, Ark.
WDAL, WDAL–FM, Meridian, Miss.
WELO, WELO–FM, Tupelo, Miss.
WJBO, WJBO–FM, Baton Rouge, La.
WJDX, WZZQ(FM), Jackson, Miss.
WOKK, WALT(FM), Meridian, Miss.
WVMI, WVMI–FM, Biloxi, Miss.
KPLC–TV, Lake Charles, La.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Four years after the passage of the 1964 Civil Rights Act, the FCC promulgated equal employment regulations for broadcasters, *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 F.C.C. 2d 766 (1968); *Nondiscrimination Employment Practices of*

Broadcast Licensees, 13 F.C.C. 2d 240 (1969); *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C. 2d 430 (1970).

The Commission issued a Public Notice in April 1971 that required its licensees to file an annual reporting form indicating the number of women, blacks, and other minorities employed by stations in various job categories (see 21 P. & F. Radio Reg. 2d 1728 (1971)). With the Pennsylvania-Delaware renewals last year, the Commission had its first opportunity to review each licensee's Equal Employment Opportunity Program (Sect. VI of FCC form 303) in conjunction with its 1971–1972 Annual Employment Reports (FCC form 395) and initiate corrective or punitive action where necessary. The Broadcast Bureau, however, had made no provision for analyzing or processing these reports.

On our own initiative my staff and I endeavored to examine these forms and evolve some standards which might be uniformly applied to stations found to have unacceptable employment records. Pennsylvania-Delaware Broadcasting Stations, 38 F.C.C. 2d 158 (1972). As a result of our research we proposed that the contrast between percentage of minorities in the community served by a station and the percentage of those minorities in the employ of a station in high-paying jobs be examined. The general standard, therefore, would be the rough parity between these groups. In my Pennsylvania-Delaware statement I suggested that any station employing less than the percentage of the local work force of a specific minority population receive a letter of inquiry. I even went so far as to suggest that the Commission might want to make the cut-off point *one-half* of that minority population that is in the local work force, and send letters to stations for which the form 395 shows less than that number of minority employees in high-paying positions.

I suggested, finally, that the most important comparison, the most meaningful one, was the percentage of the minority in question in high-paying jobs compared to the percentage of *all* employees in high-paying jobs. The obvious point for dispute is the cut-off point. Do you strive for a 1.00 relationship or do you drop down to 0.75, or even 0.50? In Pennsylvania-Delaware, the Commission chose to ignore *all* the suggested criteria and consider only those stations with *ten* or more employees, despite the fact that all stations with *five* or more full-time employees are required to file with the Commission.

In short, the criteria I itemized last year selectively identified those stations that reasonably could have been required to furnish explanations to the Commission regarding practices inconsistent with our equal employment rules.

In their August renewals action, the Commission directed the Broadcast Bureau to send equal employment opportunity letters to 30 stations which had ten or more employees and which:

(1) had no women employees, or showed a decline in the number of women employees from 1971 to 1972, or

(2) were in areas with a minority population of 5% or more and employed no blacks or showed a decline in the number of black employees from 1971 to 1972.

The purpose of these letters was to solicit from the stations the reasons for their employment patterns. The standards employed in selecting those stations that would receive letters ignored many possible patterns of discrimination—such as a station's refusal to employ minority group members and women in high-paying positions.

Once the station's responses started to pour in, the Commission was then faced with processing and analyzing them. Prepared for neither task, the Broadcast Bureau had no recourse but to accept, on face value, the responses received, and proceed with the granting of renewals.

In October 1972, Maryland, the District of Columbia, Virginia, and West Virginia renewals were considered by the Commission. Confronted with the specter of having to send out letters of inquiry to a large number of stations which had shown some decline in the number of women and blacks employed, the Commission majority backed down and advised the staff to reduce the number of stations to which letters of inquiry would be sent. It did so, and the result was that many stations falling below the standards adopted in August were not included in the mailing. I issued a dissenting statement to that action (see Equal Employment Opportunity Inquiries, FCC 92012, Nov. 10, 1972, —— F.C.C. 2d —— (1972)).

In their disposition of the Florida renewals in February 1972, the Commission majority refused even to send letters of inquiry to those stations whose employment practices raised serious questions under the current equal employment opportunity regulations. The majority approved the Broadcast Bureau's decision *not* to send letters to a substantial percentage of those stations which either did not employ minority group members or women or which had shown a decline in the number of such persons employed in the previous year. Aggravating this approval was the fact that the majority did not even think it necessary to inquire as to what methods used by the Bureau in the selection of those stations that were to receive letters. I issued a dissenting statement to that action (see Florida Renewals—1973, 39 F.C.C. 2d 1035 (1973)).

This procedure was again repeated in the Georgia-Alabama renewals in April of this year. There were a number of stations whose employment practices warranted a letter of inquiry at the very least. The majority again asked the Broadcast Bureau to reduce this list. The method of paring down the list was as arbitrary as the order to do so. I issued a dissenting statement to that action (see Georgia-Alabama Renewals—1973, FCC 00892, March 29, 1973, —— F.C.C. 2d —— (1973)).

Now we are faced with the June renewals—Arkansas, Louisiana and Mississippi. Once again the Broadcast Bureau has conducted a review of 1971 and 1972 Annual Employment Reports to determine the stations to be selected for inquiry. According to previously established criteria, the staff claims to have selected for review stations having more than ten full-time employees and which:

(1) Had no full-time women employees, or showed a decline in the number of full-time women employees from 1971 to 1972; or

104-000—73——2

(2) Are in areas with a minority population of 5 per cent or more and employed no full-time blacks or showed a decline in black full-time employees from 1971 to 1972.

The staff found 46 stations which met these criteria. Of those 46, only 19 stations were selected for further inquiry.

If there were 46 stations in the above categories, then all 46 should at least receive letters of inquiry from the FCC. The methods used for paring down the original list can only serve to dilute the original intention of the filings and impede any progress that might have been made since last August.

The problem seems to be, therefore, one of degree. To what extent is the Commission willing to deal with this problem? The majority's action is sorrowfully indicative of their lack of commitment to any meaningful enforcement of equal employment practices in the broadcast industry.

I dissent.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
MOBILE HOME NEWS, INC., MIAMI, FLA.
Concerning Fairness Doctrine Re Columbia Broadcasting Systems, Inc.

JUNE 22, 1973.

MR. CLIFF WILMATH,
Editor and Publisher,
Mobile Home News, Inc.,
P.O. Box 967,
Kendall Branch,
Miami, Fla. 33156.

DEAR MR. WILMATH: This is with reference to your fairness complaint filed with the Commission on April 12, 1973 against CBS concerning its March 5, 1973 "60 Minutes" program which dealt, in part, with mobile home living and the mobile home industry. You allege that this program presented a "biased report on mobile homes"; that on eight occasions during the program statements were made by CBS News Correspondent Morley Safer, and by others in response to questions put to them by him, which did not present a true picture of the industry, and that an opportunity to present their views was not afforded to those knowledgeable in the mobile home industry. You requested CBS to afford you "equal time" to respond to this program.

CBS responded to a March 1, 1973 request by you for "equal time" on April 9, and stated that "although the 60 Minutes segment focused on the problems faced by mobile home owners, nowhere in the broadcast was it stated or inferred that the problems discussed were typical of the entire industry. Indeed, it was specifically stated that there are many fine mobile homes manufactured in the United States." In addition, CBS had stated in response to a November 30, 1972 Commission inquiry (regarding another aspect of your complaint) that "CBS News Correspondent, Morley Safer, stated during the program that 'it should be pointed out that most of the mobile homes produced in this country are sound; at the very least they conform to the manufacturer's own specifications.'" In addition, CBS stated that two letters critical of the March 5, 1972 "60 Minutes" program were aired on the March 12, 1972 edition of "60 Minutes." CBS concluded its April 9, 1973 response to you by stating that "we are of the view that the '60 Minutes' segment in question did not give rise to any fairness doctrine obligations . . . and therefore, we respectfully reject your request for time to reply."

The fairness doctrine obligates a licensee presenting one side of a controversial issue of public importance to afford reasonable opportunity in its overall programming for the presentation of contrasting

views. It does not require equal time, and both sides need not be given in the same broadcast or series of broadcasts. Furthermore, no particular person is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views.

With respect to the sufficiency of fairness doctrine complaints, the Commission has consistently distinguished between the question of whether a reasonable opportunity has been afforded for the presentation of contrasting views and allegations which challenge the "truth" or accuracy of broadcast material or contend that the licensee has deliberately slanted or distorted its news coverage or other public affairs programming. With reference to complaints disputing the "truth" or accuracy of program material, it has been stated:

> The Commission has never examined news coverage as a censor might to determine whether it is fair in the sense of presenting the "truth" of an event as the Commission might see it . . .
>
> Rather, we shall consider the overall question of whether reasonable opportunity for contrasting viewpoints was afforded with respect to . . . controversial issues referred to in the complaints we have received. *Letter to ABC, et al.* 16 FCC 2d 650, 655–656 (1969).

With respect to the allegation that CBS presented a "biased report on mobile homes" we refer you to our letter of February 12, 1973 where we stated:

> [I]n order for the Commission to commence action in this sensitive area it must receive significant extrinsic evidence of such deliberate conduct on the part of the broadcaster in the form, for example, of statements from persons who would have to be in a position to know what news had been deliberately distorted or suppressed.

Your allegation of "bias" merely disputes the truth and accuracy of the material presented and again fails to set forth any extrinsic evidence of deliberate distortion which the Commission requires before it can take action in such matters. Therefore, further consideration of this point is not warranted.

With respect to your allegation that CBS violated the fairness doctrine, it should be noted also that the Commission reviews complaints to determine whether the licensee can be said to have acted reasonably and in good faith. In addition, the fairness doctrine does not require a line by line analysis and balance as to every statement made in discussing a controversial issue of public importance. In this regard, the Commission in *Letter to NBC*, (*AOPA Complaint*) 25 FCC 2d 735 (1970) stated:

> Clearly the licensee must be given considerable leeway for exercising reasonable judgment as to what statements or shades of opinion require offsetting presentation . . . A policy of requiring fairness, statement by statement or inference by inference, with constant Governmental intervention to try to implement the policy, would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, wide-open."

A review of the program script indicates that CBS presented views favorable to mobile home ownership. This is evidenced by interviews with the President of the Mobile Home Manufacturer's Association,

Mr. John Martin, and a mobile home dealer, Mr. O. R. Bennett. CBS also noted in its response that during the March 12, 1972 edition of "60 Minutes" the program moderators read two letters critical of the mobile home expose.

In view of the foregoing, and assuming that a controversial subject of public importance was involved, it does not appear that CBS acted unreasonably or in bad faith in its decision to deny you time to respond. Accordingly, no further Commission action appears warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
(for Chief, Broadcast Bureau).

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
SAGINAW VALLEY NUCLEAR STUDY GROUP, MIDLAND, MICH.
Concerning Fairness Doctrine Re Station WMPX, Midland, Mich.

JUNE 25, 1973.

MR. ROBERT F. PHILIP,
Chairman, Saginaw Valley Nuclear Study Group,
P.O. Box 1166,
Midland, Mich. 48640.

DEAR MR. PHILIP: This is with reference to your complaint of October 8, 1971 against Radio Station WMPX Midland, Michigan, alleging that the licensee violated the Commission's fairness doctrine and personal attack rules. You contend that the licensee improperly refused the demands of the Saginaw Valley Nuclear Study group for substantially equivalent time to apprise the community of the reasons why it opposed a nuclear power plant at Midland, and to respond to personal attacks allegedly contained in many of WMPX's pro-nuclear plant editorials. You also question whether the station's facilities were being used to encourage violation of the rules of the Atomic Energy Commission respecting *ex parte* communications (10 CFR Part II § 2.780), and whether the concurrence of the station's pro-nuclear plant editorials with those of various commercial announcements in support of the plant is mere coincidence or manifests undisclosed sponsorship forbidden by our Rules.

In support of your fairness complaint you state that the station, beginning on October 2, 1971, carried approximately three 30-second editorials per hour and various paid spot announcements in support of the nuclear plant, but offered opponents only ten minutes of air time daily and participation in a discussion program. In support of your personal attack charges you state that several of WMPX's editorials labeled opponents of the plant as "stupid" and accused the opponents of using "scare tactics," and that while the station supplied the group with copies of its editorials, it failed to advise the group of the "date, time, and identification" of each broadcast, as required by Section 73.123 of our rules.

In response to a Commission inquiry regarding your complaint, WMPX stated that prior to commencement of the editorials, the president of the licensee advised you, as chairman of the Study group, of the licensee's intention to editorialize in favor of the plant, and offered the use of its facilities to air opposing views. WMPX also stated that,

originally, ten minutes a day were made available to all groups opposing the plant, but that after you took the position that your responses should be broadcast during the same hour as the editorials, WMPX began to provide your group equal time, even though it did not believe that such time was required under the Commission's Rules; and that a review would show that the number of editorials broadcast in favor of nuclear power were virtually matched by those opposing nuclear power.

In response to your personal attack charges, WMPX stated that nothing contained in the editorials constituted an attack upon any individual, nor was there any allegation made by you that any member of your group was named individually in the editorials. It also stated that neither the Study group itself nor any other group was identified by the editorials.

In regard to your allegations that WMPX may have violated the Atomic Energy Commission's rules or *ex parte* communications and our rules regarding undisclosed sponsorship, WMPX stated that these allegations are completely undocumented and unsupported by evidence and "constitute an irresponsible and scurrilous attack upon the licensee."

In reply, you stated that the licensee was part of a campaign to bring pressure on the Atomic Energy Commission; that when the president of WMPX wrote to the Study group to offer time he sent out "blind copies" of the letter to nuclear plant advocates; that copies of editorials sent to the Commission by WMPX failed to include inserted comments by various businessmen and spokesmen for the Midland Nuclear Power Committee and that therefore the equal time claim by WMPX is less than accurate since it fails to take into account these *ad lib* plugs as well as news coverage supporting a pro-nuclear plant rally and paid advertisements supporting the plant and the rally. You also state that WMPX's claim that no individuals or groups were named in their editorials may be literally accurate, but that the context in which its announcements were presented left no doubt in the minds of the listeners as to the identity of the "small handful people . . . managing to roadblock Midland's progress" and the "few scared misinformed individuals crying wolf."

You also suggested for the first time that there may have been some impropriety in the fact that Mr. Ned S. Azbury, a stockholder of the licensee, Patten Broadcasting Company, Inc., is also a member of the Midland Nuclear Power Committee which favors the plant.

In response to your reply comments and to further inquiries by the Commission, the licensee filed further responses.

The issue of whether a nuclear power plant should be located in the Midland, Michigan, area was clearly a controversial issue of public importance. Therefore, under the fairness doctrine, if station WMPX broadcast views on one side of this issue, it was required to afford a reasonable opportunity for the presentation of contrasting views. The term "reasonable opportunity" does not mean that equal time be afforded each side, as would be the case if a political candidate appeared on the air during his campaign. Furthermore, the licensee has wide discretion in determining the appropriate method of covering an

issue, including choice of format and appropriate spokesmen for opposing viewpoints, and both sides need not be given in a single broadcast or series of broadcasts, since it is the station's overall programming which is relevant. Finally, no particular person or group is entitled to appear on the station. As was stated by the United States Court of Appeals in *Green* v. *FCC*, 447 F. 2d 323, 329 (D.C. Cir., 1971):

> [t]he essential basis for any fairness doctrine, no matter with what specificity the standards are defined, is that the American public must not be left uninformed.

A review of the entire record in this matter does not indicate that station WMPX failed to comply with the fairness doctrine. It is clear that the station took a strong position in favor of construction of a nuclear power plant in the Midland area. However, there was no prohibition against its doing so, so long as it provided a reasonable opportunity to opponents of the plant to present their views. *Editorializing By Broadcast Licensees*, 13 FCC 1246 (1949). This it did, by carrying without charge over 150 announcements furnished by the Study groups between October 7 and October 28, 1971. This being so, and with recognition of the obvious fact that the station through its own editorials and announcements by proponents of the nuclear power plant, presented a massive campaign in support of the plant, we find no basis for Commission intervention, since the purpose of the fairness doctrine is to insure the existence of an open forum on controversial issues of public importance, and to do so without interfering with robust debate. We also take note of the fact that some of the editorials suggested that opponents withdraw their opposition and that other listeners encourage them to do so; that opponents "Might feel a lot better if they lived somewhere else" if they would not be comfortable in Midland with a nuclear power plant; and that "if we all get mad enough, maybe they won't get away with it." We need not endorse the flavor of such language to find, as we do, that the editorials were within the area of robust debate, and to conclude that this record does not warrant the imputation of improper harassment.

The allegations of personal attacks similarly lack substance. While there may be substantial reason to agree that the "small number of people" and like terms used by the station adequately identified the complainants, we cannot agree that the "honesty, character, integrity or like personal qualities" of the group or its members were put in issue. The Commission has been at pains to point out that the personal attack rule requires opportunity for a response only when character is maligned and not when what is involved is a policy disagreement, no matter how sharply expressed. See *Personal Attacks, Political Editorials*, 8 FCC 2d 721, at 724 (1967); *The Port of New York Authority*, 25 FCC 2d 417 (1970). The comments relied upon here go to the quality of the opponents' position and their presentations (e.g., "the few scared misinformed individuals crying wolf"), but do not reach the level of character denunciation.

With regard to your allegations that the station's editorial position was influenced by the station's advertisers, and your charges that

the station's facilities are being used to encourage violation of the Atomic Energy Commission's rules on *ex parte* communications, the licensee has denied these allegations and you have furnished the Commission with no extrinsic or other supporting evidence. Therefore, no further Commission action is warranted on these matters. Since a licensee is free to editorialize concerning matters of public controversy, the fact that a stockholder of the licensee took a similar position as a member of a public group with no financial connection with the licensee would not raise an issue concerning the station's operation.

You have also stated that copies of editorials sent to the Commission and to you by WMPX did not include inserted comments by certain proponents of the nuclear power plant. It appears that the copies of editorials sent to the Commission omitted certain material. There is no evidence before us that such omissions were designed to deceive the Commission or to aid licensee's position, or that the material omitted had any significance regarding the issue of whether the licensee complied with the fairness doctrine, However, we wish to emphasize that the Commission expects all licensees to respond fully and accurately to Commission correspondence, and that when transcripts or tapes of particular broadcasts are furnished to the Commission they should be complete and accurate.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
(For Chief, Broadcast Bureau).

F.C.C. 73-692

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.593 OF THE COMMISSION'S RULES WITH RESPECT TO USES OF FM MULTIPLEX CHANNELS OF NONCOMMERCIAL EDUCATIONAL FM STATIONS INVOLVING A CHARGE TO THE AUDIENCE	Docket No. 19078 RM-1623

REPORT AND ORDER

(Adopted June 27, 1973; Released July 2, 1973)

BY THE COMMISSION:

1. On November 4, 1970, responding to a petition filed by Educasting Systems, Inc. (Educasting), we issued a Notice of Proposed Rule Making in the above-entitled proceeding, in which we proposed to amend Section 73.593 of our rules to permit a noncommercial educational FM broadcast station, subject to appropriate safeguards, to accept payment of tuition fees for educational courses and other appropriate material broadcast on a multiplex basis pursuant to a Subsidiary Communications Authorization.

2. The petitioner was particularly interested in furthering the use of an instructional system utilizing multiple subcarriers, which it had developed and tested on an experimental basis, in which students with especially equipped receivers might listen to an instructor on one subcarrier and choose answers to questions posed by the instructor by depressing one of several buttons, each of which select other subcarriers carrying material appropriate to the correctness of the chosen answer. However, the proposition presented is of general application—whether a noncommercial educational FM station appropriately may charge "tuition or course fees" in connection with the kind of program material authorized to be broadcast over its subcarrier.

3. The Commission made a tentative finding "that to some degree the type of operation proposed by Educasting, or the transmission of instructional types of programs on one or more subcarriers by a noncommercial educational FM station for a fee, could be conducted without undue "commercialization" of the educational FM service, and would be in the public interest; and offered for comment an amendment to Section 73.593 of its rules. The amendment to subparagraph (a)(1) of this Section, with new or modified provisions underlined, is set forth below:

§ 73.593 Subsidiary Communications Authorizations.
(a) * * *

(1) Transmission of programs which are noncommercial and in furtherance of an educational purpose, and which are of a broadcast nature but of interest primarily to limited segments of the station's audience. Illustrative services include: programs for presentation in classrooms; programs designed for special professional groups such as doctors, *lawyers and engineers; materials designed for special interest groups, including those of ethnic, safety and technical orientations and the handicapped;* and any use which would be permitted for a commercial FM station under § 73.293(a)(1), subject to the prohibitions against commercial operations and limitations as to purpose contained in this section and in § 73.503. *Uses under this subparagraph will not be considered "commercial" if there is charged either a per-course or per-pupil fee, where: (a) the material is presented by or for a bona fide educational institution; or if it is not, the licensee of the noncommercial educational FM station has investigated the material and deems it to be clearly of educational or public service value; (b) the payment is made to the educational institution or the noncommercial educational FM stations; and (c) the payments retained by the station licensee total no more than the approximate cost of conducting the SCA operation (including purchase or lease of equipment, course material, etc.) and general overhead and operational costs incidental to it. Where the material is presented by or for an educational institution, or other entity, the payments made to the station or directly to the institution or entity may also include the usual tuition fees charged for similar material presented otherwise.*

The modifications incorporated in the rule are for the purpose of insuring that the material broadcast for a fee, whether prepared by an educational institution, or not, is of an appropriate nature for educational SCA transmission, that the fee payment is made to the educational institution or other entity or to the station, and that the funds retained by the station licensee will not exceed the actual costs incurred by the station in the presentation of the program material.

4. Comments and reply comments, timely filed within the specified deadlines for those pleadings, of December 16, 1970, and January 6, 1971, respectively, were submitted by the following parties:

Comments

Bay Area Educational Television Association (KQED–FM) Corporation for Public Broadcasting (CPB) West Virginia Educational Broadcasting Authority National Association of Educational Broadcasters (NAEB) Educasting Systems, Inc.

Reply Comments

Educasting Systems, Inc.

5. All of those commenting support an amendment of the rules of the nature proposed, but certain of the parties take some exception to the specific language employed.

6. CPB notes that in stipulating that fees may be charged "per course or per pupil" the proposed rule may be interpreted as allowing such fee imposition only "for SCA services constituting formal instruction", even though other language in the rule which requires that program material be "clearly of educational or public service value" suggests that the charging of fees for a broader range of services is permitted. It is CPB's conviction that SCA operation has great potential for the provision of program services designed for special interest groups, such as the blind, the aged, or other social, ethnic or minority groups, but that the potential is unlikely to be realized fully unless licensees are able to recover the costs incidental to SCA operation.

7. To clarify what it believes to be the intention of the proposed rule, to which it subscribes, CPB suggests that the portion of the text of the rule which states that "Uses under this subparagraph will not be considered 'commercial' if there is charged either a per-course or per-pupil fee . . ." be revised to read "Uses under this subparagraph will not be considered 'commercial' if there is charged a per-course, per-pupil or other fee . . .".

8. NAEB notes that while the last sentence of the proposed rule recognizes that the broadcast material may be presented by or for an educational institution *or other entity*, and payments may be made to the institution or *entity*, the alternative represented by the underlined language is omitted from subparagraph (b) of the proposed rule, i.e., for consistency's sake, that (b) should be made to read "the payment is made to an educational institution *or other entity* or to the noncommercial educational FM station . . .".

9. The modifications suggested by CPB and NAEB are for the purpose of making more clear that the SCA program material for which a fee is charged need not necessarily be prepared by an "educational institution" if it is of educational or "public service value". The latter term causes the West Virginia Educational Broadcasting Authority some difficulty. It believes that while the educational station licensee would have little difficulty in determining whether a program offering has "educational value", "public service value" is an ill-defined term, and its employment as an alternative test of the eligibility of particular course material for the imposition of fees "could well be a source of abuse". It therefore suggests that this term be stricken, so that the sole criterion to be applied in determining whether a fee may be charged for program or course material, whether furnished by an educational institution or not, will involve the assessment of its "educational" value.

10. The comments strongly support rule amendments which would permit the imposition of charges for a rather broad range of services presented over the subcarrier of the noncommercial educational FM station. The rule which we are adopting is framed in accordance with this approach. However, on further consideration of all of the factors involved, we have found it necessary, if the public is not to be misled as to basic nature of the program material for which it is being asked to pay, that a clear distinction be drawn between those offerings prepared, sponsored, and supervised by an educational institution, constituting formal instructional or institutional credit material, and those programs which, while they may be of considerable value to their intended audience, do not have the imprimatur of an educational institution.

11. Accordingly, without limiting the freedom of action of the station to make charges for appropriate program material, we have redrafted the proposed rule to establish the distinction described above, and to require that the noncommercial educational FM station make clear for prospective subscribers to a program series or course of instruction the instrumentality primarily responsible for its preparation and presentation.

12. Since the rule which we are adopting differs substantially in structure from the one we had proposed, the specific changes in wording in the proposed rule suggested by the parties no longer has pertinence. However, we believe that the rule, as now revised, by establishing a separate category of programs, not presented under the auspices of an educational institution for which a charge may be made, provides the clarification of intent which the parties sought to achieve by their suggested changes.

13. Accordingly, IT IS ORDERED, That, effective August 13, 1973, Part 73 of the Rules and Regulations IS AMENDED as set forth in the Appendix hereto. Authority for this action is found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

1. Section 73.593(a)(1) is amended to read as follows:

§ 73.593 Subsidiary Communications Authorizations.

(a) * * *

(1) Transmission of programs which are noncommercial and in furtherance of an educational purpose, and which are of a broadcast nature but of interest primarily to limited segments of the station's audience. Typical services may include: programs for presentation in classrooms; programs designed for specific professional groups, such as doctors, lawyers, and engineers; programs intended to serve the special needs and interests of the aged, the handicapped, particular social and ethnic groups, and for those in a specific trade or sharing a common interest or hobby; programs for individualized remedial or advanced learning needs; and any use permitted for a commercial FM station under § 73.293(a)(1), subject to the prohibition against commercial operation and the limitation as to purpose contained in this section and in § 13.503, such limitation especially including those non-instructional services customarily provided by commercial firms. Uses permitted under this subparagraph will not be considered "commercial", when charges are made for the service rendered, under the circumstances and subject to the conditions set forth hereunder:

(i) A per-course, per-session, per-seminar, per-pupil or other appropriate fee is charged for formal or informal instructional material, presented by, with or for a *bona fide* educational institution. Payment of the fee shall be made to the noncommercial educational FM station or to the educational institution; such fee may include, in addition to the station expenses detailed in (iii), below, the usual tuition charged for similar material presented by other means.

(ii) A charge is made for a program or series of programs, informational or generally instructional in nature, intended to meet the special needs and interests of one or more of the groups the station is authorized to serve under its SCA. Payment of the charge shall be made to the noncommercial educational FM station.

(iii) Payments retained by the station shall total no more than the approximate cost of conducting the SCA operation (including purchase or lease of equipment, course material, personnel services, etc.) and the general overhead and operational costs attributable to such operation.

(iv) A noncommercial educational FM station offering program material subject to fee or other charge shall clearly indicate in any broadcast or printed solicitation to prospective enrollees whether the material falls into category (i) or (ii), above, so that informational and general educational materials are not represented as formal instructional or institutional credit programs.

* * * * * * *

F.C.C. 73-693

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS, WELLSBORO, PA.	Docket No. 19587 RM-1807

REPORT AND ORDER

(Adopted June 27, 1973; Released July 2, 1973)

BY THE COMMISSION:

1. The Commission here considers the Notice of Proposed Rule Making, adopted September 13, 1972 (FCC 72-817; 37 Fed. Reg. 19651), in this docket concerning possible amendment of the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) by substituting Class B Channel 283 for Channel 249A at Wellsboro, Pennsylvania. The only party commenting is the petitioner, Farm and Home Broadcasting Company (Farm and Home), licensee of AM Station WNBT (Class IV) and Station WGCR-FM, Wellsboro, Pennsylvania, which has also indicated its desire for modification of its license for WGCR-FM to specify operation on Channel 283 instead of 249A.

2. Wellsboro, population 4,003,[1] is the seat of Tioga County, Pennsylvania, population 39,691. Farm and Home's broadcast facilities at Wellsboro are the only ones licensed in Tioga County, which, as pointed out in the Notice, is a more or less isolated area made up of rural dwellings and small communities. The nearest substantial concentrations of population are Williamsport, Pennsylvania, 38 miles to the southeast, and three communities in New York—Elmira, 35 miles to the northeast; Corning, 30 miles north; and Olean 63 miles to the northwest. Petitioner asserts that Wellsboro, because of its central location, is the hub of commercial, governmental, and social activity of Tioga County and the general area. This includes seven employers with at least 150 employees; 77 retail establishments with sales of over $15 million of the total in Tioga County (381 with about $47 million);[2] and Commonwealth Bank and Trust Company (assets in excess of $76 million) and Citizens and Northern National Bank & Trust Co. (over $54 million of assets) with multiple branches elsewhere are based there. Other economic data is set forth in the Notice, but we need not detail it here.

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[1] Population information is from the 1970 Census unless otherwise specified.
[2] For 1967.

3. As pointed out in the Notice, the petitioner's principal contention is that Station WGCR–FM could serve substantially greater population than with its present maximum Class A facility. With a facility of 20 kw E.R.P. and 480 ft. A.A.T., Farm and Home showed that there would be a gain of service of 70,457 persons in an area of 1,888 square miles, in fact providing a first FM service to 3,750 persons in a 176 square mile area and a second FM service to 15,922 persons in an area of 720 square miles.[3] Channel 283 may be assigned only to a small area including Wellsboro without changes elsewhere; if assigned there, preclusion to communities not already having FM assignments would occur on only Channels 280A and 285A, but Channels 249A or 261A may be assigned to such communities.

4. It would appear that the public interest, convenience and necessity would be served by assigning Channel 283 in lieu of 249A at Wellsboro, Pennsylvania. As indicated above, Channel 283 would be put to use whereas it might otherwise remain fallow; and its use can provide substantial additional service. In the latter respect, in order to assure a reasonable amount of first and second FM service, we are conditioning operation of a station on Channel 283 with 30 kw E.R.P. and 300 A.A.T. antenna height or equivalent[4]; see and compare *Roanoke Rapids and Goldsboro*, 9 F.C.C. 2d 672 (1967). The Canadian Department of Communications has agreed to this change pursuant to the Working Arrangement under the Canadian-U.S.A. FM Agreement of 1947. Assignment of the channel meets our spacing requirements.

5. Authority for the actions proposed herein is contained in Sections 4(i), 303(g) and (r), 307(b), and 316 of the Communications Act of 1934, as amended.

6. In accordance with the foregoing, IT IS ORDERED, That the FM Table of Assignments (Section 73.202(b) of the Commission's Rules and Regulations) IS AMENDED, effective August 13, 1973, as concerns Wellsboro, Pennsylvania, as shown below:

City:	*Channel No.*
Wellsboro, Pa	*283

*Any application for this channel must specify at least an effective radiated power of 30 kW and antenna height of 300 feet above average terrain or equivalent.

7. Farm and Home Broadcasting Company, having indicated its consent thereto, IT IS FURTHER ORDERED, That effective August 13, 1973, and pursuant to Section 316(a) of the Communications Act of 1934, as amended, the outstanding license held by Farm and Home Broadcasting Company for Station WGCR–FM, Wellsboro, Pennsylvania, IS MODIFIED to specify operation on Channel 283 in lieu of Channel 249A, subject to the following conditions:

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[3] Farm and Home made another showing based on maximum facilities—a gain of service of 107,079 persons in a 2,816 square mile area with first and second service to 4,129 persons in a 272 square mile area and 29,904 persons in an area of 1,152 square miles, respectively. That showing was referred to in Paragraph 4 of the Notice.

[4] While Farm and Home made a showing based on a facility with 20 kw power and 480 feet antenna height, it did not commit itself to building at that height and power. We note that the latter would limit 1 mv/m service to an area slightly greater than the stated minimum; considering uniform terrain distance from the transmitter would be about 27 and 25 miles, respectively.

(a) The licensee shall inform the Commission in writing by no later than July 23, 1973, of its acceptance of this modification.

(b) The licensee shall submit to the Commission by September 17, 1973, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station WGCR–FM on Channel 283 at Wellsboro, Pennsylvania.

(c) The licensee may continue to operate on Channel 249A under its outstanding authorization until it is ready to operate on Channel 283. Ten days prior to commencing operation on Channel 283, the licensee shall submit the same measurement data normally required in an application for an FM broadcast station license.

(d) Farm and Home Broadcasting Company shall not commence operation on Channel 283 until the Commission specifically authorizes it to do so.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-647

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LEROY GARRETT, TRADING AS GARRETT BROADCASTING SERVICE (WEUP), HUNTSVILLE, ALA.	Docket No. 19258 File No. BP-18295
WRBN, INC. (WRBN), WARNER ROBINS, GA.	Docket No. 19259
For Construction Permits	File No. BP-18409

ORDER

(Adopted June 13, 1973; Released July 3, 1973)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (a) a decision of the Review Board in this proceeding, FCC 72R-339, 38 FCC 2d 112, released November 27, 1972; (b) an application for review thereof, filed December 26, 1972, by Leroy Garrett, tr/as Garrett Broadcasting Service (WEUP); (c) comments on application for review, filed January 8, 1973, by WRBN, Inc; (d) an opposition, filed January 10, 1973, by the Chief, Broadcast Bureau; and (e) a reply filed January 17, 1973, by WEUP.

2. IT IS ORDERED, That the application for review, filed December 26, 1972, by Leroy Garrett, tr/as Garrett Broadcasting Service (WEUP), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In this matter, radio station, WEUP (5000 watts, daytime only), licensed to Garrett Broadcasting Co., Huntsville, Alabama, and WRBN licensed to WRBN, Inc. (1000 watts, daytime only) Warner Robins, Georgia, filed applications for construction permits (CP's) to operate with a nighttime power of 500 watts on the frequency 1600 kHz. Although both licensees had agreed not to contest each other's applications, the Broadcast Bureau considered the applications mutually exclusive because the proposed nighttime contour of WEUP could, theoretically, cause interference to 13.4% of the population within WRBN's proposed nighttime contour. WRBN's signal, on the other hand, would not have caused interference to WEUP's proposed nighttime service area. Because of the theoretical possibility of interference to WRBN's nighttime signal, the applications were designated for consolidated hearing to determine which grant—WEUP or

104-000—73——3

WRBN—would better result in a fair and equitable distribution of radio facilities.[1]

WEUP's proposal would have added the first Black owned and oriented nighttime radio signal to the city of Huntsville which has a Black population of approximately 16,729.[2] Additionally, WEUP's projected contour would have embraced 49% of the total city area of 105.6 square miles (i.e., 51.7 square miles); it would have served 73.4% of the total Huntsville population of 137,802 (i.e., 101,213); and, it was alleged that the WEUP nighttime signal would have provided a first primary AM signal to approximately 42,000 persons and a first or second service to approximately 53,000 persons, including 6,000 blacks.[3]

WRBN's proposal would have constituted the first primary nighttime AM signal to the city of Warner Robins covering—if granted alone—89.4% of the total city area of 11.3 square miles (i.e., 10.1 square miles) and served 92.4% of the total Warner Robins population of 33,760 (i.e., 31,194). If granted along with WEUP's application, the 14.54 mv/m "interference free" contour of WRBN's nighttime signal would have been reduced to 77% of the total city area (i.e., 8.7 square miles) and 81.4% of the total population (i.e., 27,479).

Hence, if both applications had been granted, 101,213 persons in Huntsville could have received a black-owned and oriented signal while the concomitant loss to WRBN in terms of an "interference free" signal would be some 3,615 persons and 1.7 square miles. It is obvious that the slight diminution of service—if WEUP's application were also granted—was of no great moment to the Warner Robins applicant since WRBN, Inc. had agreed not to contest Garrett's application.

Nonetheless, both the Administrative Law Judge (ALJ) and the Review Board determined to grant nighttime operating authority to the Warner Robins applicant and deny the Huntsville application. The Commission, by denying Garrett's Application for Review of the Review Board's Decision has affirmed the dispositions below. Because I perceive several errors of decisional significance in these proceedings, I respectfully dissent.

First, inasmuch as neither applicant's proposed signal would have covered their respective cities of license in their entirety as required by Section 73.30(c) of our rules (47 C.F.R. § 73.30(c)), both applicants needed a waiver of that stricture. But, while a waiver was granted to WRBN, none was accorded to WEUP and it is this issue which both the ALJ and Review Board weighed most disfavorably against Garrett.[4]

As indicated above, WEUP's proposed nighttime signal would have encompassed only 49% of the 105.6 square miles of Huntsville. WEUP

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[1] This is a so-called "307(b)" issue (47 U.S.C. § 307(b)); other issues were designated in the hearing and to the extent relevant are discussed *infra*.

[2] All demographic data is extracted from the Administrative Law Judge's *Initial Decision*, 38 F.C.C. 2d 117 (1972).

[3] Although there are presently three other AM stations operating nighttime in the Huntsville area, their coverage of the city is said to be extremely limited; *viz.*, two of the stations only serve 0–25% of the population at night while the third station serves merely 25–50% of the citizens.

[4] Strangely, inasmuch as the ALJ found that Garrett had not carried its "heavy and compelling burden" to justify a waiver (*I.D.* at 124), his opinion grants—as if by default—the § 73.30(c) waiver to WRBN.

argued that in 1950 the city itself was 4.2 square miles but, through subsequent incorporation of contiguous areas, the city exploded to its present proportions and that signal—covering 51.7 square miles and 73.4% of the 137,802 population—would certainly cover the city as previously constituted and a great deal more. Much more, in fact, than the existing nighttime signals now serving the city (see f.n., 3 supra) and especially the "core" area of Huntsville where a great number of Blacks reside. The Commission rejected this line of argument and denied a Section 73.30(c) waiver to Garrett.

However, there is Commission precedent which supports Garrett's contentions. In *Great Southern Broadcasting Co.*, 7 FCC 2d 860 (1970), we took cognizance of the difficulties confronting applicants with outsized territories comprising their cities of license; we said:

> Since the new municipality is so large and since it encompasses urban areas, small towns and farmland—all with diverse needs and interests—the Commission, in allocating stations, will continue to recognize the former town and city limits as they existed prior to the merger. *Great Southern Broadcasting Co.*, 7 F.C.C. 2d at 860.

Consequently, WEUP's proposal should have been considered in light of the *Great Southern* doctrine. It was not and I find error in the Commission's neglect of that principle.

Second, although WRBN, Inc. herein urged the need for nighttime service to Warner Robins, neither of the decisions below emphasized the important fact that WRBN, Inc. already owns a nighttime facility in that city—WRBN–FM. Presumably, although the lower decisions are silent on the point, WRBN–AM's signal will cover substantially the same people at night as are now receiving WRBN–FM. More importantly, and completely ignored in the decisions, is the pivotal fact that WRBN–FM merely duplicates the programming of WRBN–AM.[5] Thus, instead of a "new" voice in Warner Robins at night, it appears that the population will simply acquire a redundancy in programming which WRBN, Inc. could provide at night on the FM licensed to it already. A grant, therefore, of the nighttime AM to WRBN, Inc. means to the people of Warner Robins not a choice, an echo.

Heretofore, the Commission has indicated that duplicated AM/FM programming is a critical issue in determining whether or not to grant a facilities application. We stated:

> Just as our recent 307(b) suburban policy goes beyond mere labels to consider the real nature of a proposal, consideration of significant duplication is relevant to determining whether the proposal really represents the new service for which a greater need might exist. Consequently, we have concluded that the question of duplicated programming can properly be considered as a matter of efficient utilization of this frequency under the 307(b) issue. *Cherokee Broadcasting Co., et. al.*, 6 F.C.C. 2d 505, 507 (1967).

Despite the precatory language, it is clear that "simultaneous reruns" which offer no diversity in AM/FM programming choices is a material element to be considered in CP applications. The Commission must decide whether proposals to use scarce broadcasting channels for programming identical to that already available in the community is

[5] It is unclear exactly what percentage of the AM programming is duplicated on FM. *Broadcasting Yearbook, 1973* indicates 80% while WRBN–FM's April 23, 1973, Renewal Application suggests 100%. For purposes of this opinion, either figure will do.

an efficient use of the spectrum. This question was not explored below in contravention of the edict enunciated in *Cherokee;* and, in my opinion, that failure represents a mistake which could have turned the case in WEUP's favor.

In view of the foregoing, and particularly the improperly considered Section 73.30(c) waiver and AM/FM duplication matters hereinabove discussed, I would have remanded the proceedings for holdings on those points. Since those points are vital insofar as appropriate support for Garrett's application, I cannot conclude that the majority acted correctly.

Dissenting Statement of Commissioner Benjamin L. Hooks

In Re Application of Leroy Garrett (WEUP), Huntsville, Alabama

ERRATUM

This is an unusual erratum to cover a rather unusual circumstance.

In a dissent to the Commission's *Order* in the above case (FCC 73–647, released July 3, 1973), I cited language in a *Designation Order* in *Cherokee Broadcasting Co.*, 6 F.C.C. 2d 505, 507, relating to § 307(b) consideration of duplicated AM and FM programming.

While the cited language is correct and although the *FCC Reports* indicate that the *Designation Order* involved was "[A]dopted January 5, 1967", I have been informed that there is some question as to the validity of that *Order* and that the printing thereof in the *FCC Reports* was apparently a mistake.

Official Commission Minutes on the proceeding chronologize the following history. The *Order* appearing as cited at 6 F.C.C. 2d 505 came up for Commission consideration and was, in fact, adopted on January 5, 1967. (Minute Entry 6–A–67). However, the item appeared mysteriously again—after its January 5 adoption—on the Commission Agenda on January 18, 1967, was passed for one week (Minute Entry 23–A–67), and an entirely new *Order*, sans the AM/FM duplication issue, was adopted on February 1, 1967 (Minute Entry 39–A–67); the second *Order* is printed at 6 F.C.C. 2d 634 (1967).

Although, in the absence of documentation that the January 5, 1967, *Designation Order* was formally abrogated, its validity can be argued, I will assume that the second *Order* supplanted the first and delete my reference to *Cherokee* as support for AM/FM duplication consideration. Instead, I will associate myself with the dissent of Commissioner Cox [1] to the latter *Order* which supports, as I do, the principle enunciated in the First *Cherokee Order.*

[1] See, Statement of Commissioner Kenneth A. Cox, Concurring in Part and Dissenting in Part, *Cherokee Broadcasting Co.*, 6 F.C.C. 2d 623, 627 (1967).

F.C.C. 73-700

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF HENDERSON BROADCASTING CORP., LICENSEE OF RADIO STATION KGRI, HENDERSON, TEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 5, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture in the amount of one thousand dollars ($1,000) dated February 2, 1972 addressed to Henderson Broadcasting Corporation, the licensee of Station KGRI, Henderson, Texas, and (2) the licensee's response, dated February 29, 1972, to the Notice of Apparent Liability.

2. The Notice of Apparent Liability was issued for willful or repeated violations of provisions of the station license, its presunrise service authorization, and Section 73.87 of the Commission's Rules in that the station was operated during presunrise hours with full daytime power of 250 watts when authorized to operate with only 15.9 watts. Such operation occurred from December 1, 1970 to March 25, 1971 daily from 6:00 a.m. local time to the average monthly sunrise times set forth in the station license which were 7:15 a.m. in December, 7:15 a.m. in January, 7:00 a.m. in February, and 6:30 a.m. in March. The Notice of Apparent Liability was also issued for violation of Section 73.111(a) and Section 73.113 of the Commission's Rules in that from December 1, 1970 to March 25, 1971 the station operators recorded antenna current readings in the operating logs when the operators had not read the antenna current meter. The Notice of Apparent Liability provided that this proceeding was confined to violations which occurred within one year prior to the date of the issuance of the Notice. The Notice was issued on February 7, 1972.

3. The licensee responds to the Notice of Apparent Liability by stating that the licensee is not claiming non-liability for violation of Sections 73.111(a) and 73.113. There is nothing in the response indicating a defense to the alleged violations of the terms of the station license, the presunrise service authorization, or Section 73.87 of the Commission's Rules. However, the licensee states that the amount of apparent liability is excessive and would be better spent if applied to payment for $5,000 of new equipment which the licensee claims to have spent to put the station in better operating condition. The licensee

also states that the station has operated at a financial loss during the past five years and that "good capable employees have been hard to find since" the Vice-President and General Manager had been spending his time at other stations controlled by the licensee's principal stockholders. The licensee further states that a closer check is being kept by the management to ensure compliance with the Commission's Rules.

4. Licensees are responsible for the acts or omissions of their employees, *International Broadcasting Corp.*, 19 FCC 2d 793 (1969) and will not be excused for past violations because of subsequent corrective action, *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). The licensee's financial condition was considered by the Commission before issuance of the Notice of Apparent Liability in these proceedings. We find that the violations were repeated as above indicated and, considering the seriousness of operating with power almost 16 times greater than that authorized and the making of entries in the logs without reading the tower base ammeter, the amount of forfeiture is not excessive. In the early case of *Crowell-Collier Broadcasting Corp.*, 21 RR 921. 927 (1961) we stated:

> We intend to use the forfeiture proceeding, as we believe it was intended to be used, to impel broadcast licensees to become familiar with the terms of their licenses and the applicable Rules, and to adopt procedures, including periodic review of operations, which will insure that stations will be operated in substantial compliance with their licenses and the Commission's Rules.

Having found that the violations were repeated it is unnecessary that we make any additional finding as to willfulness. *Paul A. Stewart*, FCC 63–411, 25 RR 375.

5. In view of the foregoing, IT IS ORDERED, That Henderson Broadcasting Corporation, the licensee of Station KGRI, Henderson, Texas forfeit to the United States the sum of one thousand dollars ($1,000) for repeated failure to observe the provisions of the station license, presunrise service authorization for Station KGRI, and Sections 73.87, 73.111(a), and 73.113 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Henderson Broadcasting Corporation, licensee of Radio Station KGRI, Henderson, Texas.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–585

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Standard Broadcast Applications Ready and Available for Processing Pursuant to Section 1.571(c) of the Commission's Rules	

JUNE 1, 1973.

THE COMMISSION BY COMMISSIONERS BURCH (CHAIRMAN), ROBERT E. LEE, JOHNSON, H. REX LEE, REID, WILEY AND HOOKS, ISSUED THE FOLLOWING PUBLIC NOTICE:

STANDARD BROADCAST APPLICATIONS READY AND AVAILABLE FOR PROCESSING PURSUANT TO SECTION 1.571(C) OF THE COMMISSION'S RULES

The following applications seek the identical facilities of former station KOOD, Lakewood, Washington. The license of KOOD was cancelled and the call letters were deleted by Commission action of September 13, 1972. A petition seeking reconsideration of this action was denied on May 31, 1973. Accordingly, we have waived the provisions of the note to section 1.571 of the Commission's rules to permit acceptance of the applications for filing. Similarly, we will accept any other applications for consolidation with the following applications which propose essentially the same facilities:

NEW, Lakewood, Washington
Clay Frank Huntington
Req: 1480 kHz, 1 kW, Day
NEW, Lakewood, Washington
Dale A. Owens
Req: 1480 kHz, 1 kW, Day

Pursuant to the provisions of sections 1.227(b)(1) and 1.591(b) of the Commission's rules, an application, in order to be consolidated with the above applications must be in *direct* conflict and tendered no later than July 16, 1973.

The attention of any party in interest desiring to file pleadings concerning these applications, pursuant to section 309(d)(1) of the Communications Act of 1934, as amended, is directed to section 1.580(i) of the Commission's rules for the provisions governing the time of filing and other requirements relating to such pleadings.

F.C.C. 73-637

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by KOTCOM BROADCASTING, INC., HYANNIS, MASS. For Extension of Time To File a Petition To Deny	BPH-8372

JUNE 13, 1973.

STAMBLER AND SHRINSKY,
1737 DeSales Street NW.,
Washington, D.C. 20036.

GENTLEMEN: This is in reference to your "Petition for Extension of Time," filed May 18, 1973, on behalf of Kotcom Broadcasting, Inc. (Kotcom), licensee of FM station WCOD, Hyannis, Massachusetts, in which you request an extension of time to and including July 26, 1973, in which to file a petition to deny the pending application (BPH-8372) of Seashore Broadcasting Company, for a new FM station in Orleans, Massachusetts.

Section 1.580(i) of the rules provides, in pertinent part, that any party in interest may file a petition to deny an application for a new FM broadcast station "no later than thirty days after issuance of a public notice of the acceptance for filing" of such application. Public notice of the acceptance for filing of Seashore Broadcasting Company's application was issued on April 27, 1973.

Section 1.46 of the rules provides that extensions of time for filing any pleading or other paper may be granted "upon motion for good cause shown." In support of your request, you state that Kotcom intends to file a petition to deny based upon economic injury to the operation of its Hyannis FM station, that "the requirements for proving economic injury are exceedingly detailed and time consuming" (citing *Carroll Broadcasting* v. *FCC*, 28 F. 2d 440 (1958)), and that the gathering of such technical data must be undertaken by Kotcom's president and general manager who bears all the responsibility for running the station. You conclude that if this individual is forced to divert his attention from the affairs of the station during "these crucial billing months," financial loss will result and affect the station's operation, programming and the public interest.

The Commission does not normally grant requests for waivers of the time limitations set forth in section 1.580(i) without ample justification therefor. You have not set forth any facts with sufficient particularity which would indicate that the data which you intend to file could not have been timely submitted and it does not appear that any basis exists for a two-month extension of time. Accordingly,

we are of the opinion that your request should be denied. However, this action is not to be construed as preventing the Commission from considering any substantive matters which may be submitted in any informal objection to the grant of the application of Seashore Broadcasting Company.

In view of the above, IT IS ORDERED that your request, filed on behalf of Kotcom Broadcasting, Inc., IS DENIED.

Commissioner Johnson concurred in the result. Commissioner H. Rex Lee was absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73R-246

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of PACIFICA FOUNDATION, WASHINGTON, D.C. For Construction Permit	Docket No. 18634 File No. BPED-896

ORDER

(Adopted June 28, 1973; Released July 3, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. The Review Board having before it a Motion for Stay, filed June 6, 1973, by Pacifica Foundation (Pacifica), requesting the Board to stay the hearing in the above-styled proceeding scheduled for September 4, 1973;

2. IT APPEARING, That on April 4, 1973, the Presiding Judge granted Pacifica's request for a continuance of the hearing to permit Pacifica to file a petition for extraordinary relief with the Commission; and

3. IT FURTHER APPEARING, That in a prehearing conference held on May 30, 1973, the Judge dissolved the continuance and scheduled resumption of the hearing in this proceeding for September 4, 1973; and

4. IT FURTHER APPEARING, That movant by its instant request seeks to have the Board stay the aforementioned Judge's ruling until action has been taken on Pacifica's petition for extraordinary relief; and

5. IT FURTHER APPEARING, That movant has not shown an abuse of discretion by the Presiding Judge in dissolving the continuance and rescheduling the hearing date for September 4, 1973; [1]

6. IT IS ORDERED, That the Motion for Stay, filed June 6, 1973, by Pacifica Foundation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] See *Magic City Broadcasting Corp.*, FCC 63R-199, 25 RR 393, review denied FCC 63-693, 25 RR 394a.

F.C.C. 73-707

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Various Requests for Waiver of the "Prime Time Access Rule" (Section 73.658(k), Through September 30, 1973, for Station KOMO-TV, Seattle, For the Fall of 1973, and for the *National Geographic* Program for 1973-74

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 2, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE DISSENTING TO THE GRANT OF WAIVER FOR THE NATIONAL GEOGRAPHIC PROGRAM; COMMISSIONER JOHNSON DISSENTING TO THE GRANT OF ALL WAIVERS; COMMISSIONER H. REX LEE CONCURRING IN THE GRANT OF WAIVERS FOR SPORTS RUNOVERS, THE MISS AMERICA PAGEANT AND "ONE TIME" PROGRAMS, BUT DISSENTING TO THE GRANT OF ALL OTHER WAIVER REQUESTS.

1. The Commission here considers a number of requests for waiver of various provisions of the "prime time access rule", Section 73.658 (k). The requests dealt with herein are matters which will arise during the period before October 1, 1973, plus requests concerning the *National Geographic* program through the broadcast year 1973-1974. They include: (1) requests for waivers if necessary in connection with sports "runovers" filed by American Broadcasting Companies, Inc. (NBC), and a related request by the licensee of Stations KOMO-TV, Seattle, Washington, and KATU, Portland, Oregon, plus the NBC "Miss America" program; (2) requests for suspension of the rule earlier than October 1 for stations in markets which are leaving the "top 50 market" list for the 1973-74 year starting October 1, 1973; (3) somewhat novel requests relating to "one time" programs which were shown once on a network and which licensees now seek to show despite the provisions of the "off-network" restrictions of the rule; and (4) requests for waiver of the "off-network" restrictions of the rule for 1973-74 with respect to the *National Geographic* program.

2. We anticipated earlier that a decision in the overall prime time access rule proceeding, Docket 19622, would be forthcoming before now. However, it was decided that the public interest would be served by holding oral argument in that matter at the end of July, which could postpone a decision until September. Therefore, it is appropriate to turn individually to the requests involved here.

3. *Sports "runover" waivers and the NBC Miss America program.* Except for the KOMO–TV request, the requests considered here are matters which the Commission has considered before and in which it has generally granted waiver. For NBC, they include waivers to accommodate "overruns", if they should occur, in connection with Saturday afternoon baseball games starting at 4 p.m. E.T., or before, and Monday night baseball games starting at 8 p.m. E.T.; American Football Conference exhibition football games, starting at 8 or 9 p.m. E.T.; the major league All-Star baseball game on July 24 (with pre-game show beginning possibly as early as 7:30 p.m. E.T.); and the *Miss America* pageant on September 8, which involves the problem of an event starting on the network at 10 p.m. E.T., waiver being necessary to carry it and two other hours of network programs the same evening in the Mountain and Pacific time zones. (We do not deal at this time with NBC's request concerning the World Series of Golf on September 8 and 9.) For ABC, there are two requests for events in July, the U.S. Women's golf tournament on Sunday afternoon, July 22, with coverage scheduled to end at 6 p.m. E.T., and no possibility of a playoff that day, and the "Hall of Fame" pro football game from Canton, Ohio, Saturday, July 28, scheduled from 4 to 7 p.m. There will be no post-game shows in these events.

4. Waivers have been granted for these and similar events in the past, and there appears no reason for a different result here. In "footnote 35" of the Report and Order adopting the rule in May 1970 (23 FCC 2d 382, 395) we recognized the problem presented by these events, whose duration is uncertain and for the most part not subject to the control of the networks, and stated that waiver would be granted where it appeared the scheduling was reasonable so that in normal course runover into prime time would not occur. This appears to be the case with respect to the bulk of the events involved here. We have recognized in the past scheduling of 3 hours for football, and that amount or less for baseball, as appropriate in this connection, and there appears no reason to reach a different result. The same applies to ABC's golf-tournament request. Concerning the evening events—including *Miss America*—we have recognized in a number of decisions the problem of Pacific and Mountain time zone stations in fitting into their schedules "simultaneous" broadcasting, where programs present no problem in the Eastern and Central zones because the latter part falls outside of prime time, but where problems are created in the Western part of the country. We have adopted a liberal approach in these cases (including the *Academy Awards* and *Miss America* telecasts on NBC) and believe it is clearly warranted on this occasion. In this connection, we note the opposition of the National Association of Independent Television Producers (NAITP) to these waivers; but this has been discussed in an earlier decision (*ABC and NBC Requests for Sports Waivers*, FCC 73–450, 40 FCC 2d 737 (released May 4, 1973)) and the same considerations are applicable.

5. Actually, the only one of these requests which raises a real question is that of NBC for the All-Star baseball game, where its coverage may start as early as 7:30 p.m. E.T., with the pre-game show. However, this waiver was granted for 1972 (FCC 72–612, 24 R.R. 2d

918), and, pending final decision in Docket 19622, we do not see that a different result is indicated on this occasion.

6. *KOMO–TV and KATU Requests for possible "runover" waiver.* The letter request by Station KOMO–TV, Seattle, and KATU, Portland, Oregon, relates to their carriage of ABC Monday-night football games during the fall season. These originate at 9 p.m. E.T., or 6 p.m. P.T., and would not present a problem if they were carried by these stations on a "simultaneous" basis. However, KOMO–TV and KATU do not wish to break up their nightly 6–7 p.m. local and network news programming, and therefore delay the football game until 7 p.m. P.T. This raises the possibility that there will be a "runover" if the game goes beyond three hours. However, this does not appear likely, and there is no reason to deny waiver in such a case any more than with others discussed herein. Accordingly, this request for waiver to accommodate the "runover", if it should be needed, is granted.

7. *Waiver requests by stations in markets which will be dropped from the "top 50 market" list.* The "top 50 markets", in which affiliated stations are covered by the rule, are listed by the Commission in a public notice usually issued in late November or December, based on the annual American Research Bureau (ARB) *Television Market Analysis*, which in current years is published in November. The list applies for the twelve-month period beginning the following October 1. Usually, there are two or three changes each year at the bottom end of the list, with markets coming in and others dropping out. Two markets in for the 1972–73 year but out for this coming year are Orlando-Daytona Beach, Florida, and Salt Lake City, Utah. Two stations in these markets (WFTV, Orlando, ABC-affiliated, and KSL–TV, Salt Lake City, CBS-affiliated) have requested permission to remove themselves from the rule slightly earlier than October 1, at a date which it appeared, would coincide with the beginning of their networks' fall season, or around September 10, in order not to have to make two sets of programming changes within a short time. Grant of waiver in these cases appears appropriate.

8. *Two requests concerning the "off-network" restrictions and single programs.* Two pending requests involve the "off-network" restrictions contained in Section 73.658(k) (3) and their application to single programs. In one case, raised in a letter on behalf of Station WKRC–TV, Cincinnati, Ohio (ABC-affiliated), the question is whether an ABC one-time "special" program, now distributed in syndication, should be considered "off-network" for a station in the Cincinnati market where it was not shown on the network. The second concerns the new syndicated series "Ozzie's Girls". This was a situation which NBC advanced financing for the "pilot" and acquired thereby the right to show the pilot on the network even if it decided later not to take the resulting series for network use. This occurred; NBC showed the pilot on the network in September 1972, but did not pick up its option for the rest of the series, which is now being distributed in syndication. In a petition requesting waiver for the "pilot" episode, Filmways, Inc., the owner of the program, asserts that this episode is a necessary part of the whole series package, since it introduces the characters and "sets

the stage" for the series, and thus is necessary for the viewer to understand the rest of it. It is stated that, therefore, it is simply a question of using this episode as part of the package (including presentation during the "access period" for which the series is designed) or remaking this episode entirely, at considerable expense.

9. In our view, waiver in both of these cases is warranted. As to the first, which is probably the more difficult, the rule excludes "off-network programs" from the access period; and this is true whether or not the particular program involved may not have been shown in the particular market. This is consistent with the intent of the rule to provide the maximum possible availability of valuable prime time to new material. On the other hand, if a program was not shown in a particular market, it does not have any of the "re-run" character of such material generally, and, being only one individual program, its use will not substantially affect the availability of prime time to non-network sources of new material. On balance, we are of the view that this is a case where the restraint on licensee freedom of choice involved in applying the "off-network" restriction is not warranted, and therefore *cessante ratione legis, cessat ipsa et lex.* The second matter—involving the "Ozzie's Girls" pilot episode—appears fairly clear, and, indeed, in this case grant is not opposed by NAITP, which states that it has no objection because this is the kind of situation where grant may well encourage, rather than discourage, independent production. It seems apparent that either the pilot or a substantially similar opening program must be shown; and to require simply a "re-make" of one program, by literal enforcement of the rule, would come uncomfortably close to a "featherbedding" approach to this subject.

10. *Waivers for 1973–74 for the National Geographic program.* Following the Commission's action of last fall granting 5 stations waiver to present the National Geographic program during the access period for 1972–73 (FCC 72–956, 37 FCC 2d 933, October 3, 1972) 7 other stations were granted similar authority as to this program by staff action pursuant to delegated authority, and it has since developed that three others began showing it in the mistaken belief that the waiver granted was general, a total of 15 stations. The licensees of some 9 of these stations have recently requested waiver for the same program for 1973–74, as have the licensees of three other stations which have not presented it so far (WLWD, Dayton, WNYS–TV, Syracuse and WEWS–TV, Cleveland).

11. This raises generally the same question we have considered previously, and again today, in connection with waiver for *Wild Kingdom* for this coming year. On balance, we believe that favorable action at this time is warranted for the same reasons, especially since, with the decision in Docket 19622 perhaps not certain until September, the next season would be practically at hand before the decision could be made. Therefore, we are granting these waiver requests. However, it is emphasized that this is *not* a general grant of waiver for this program; other requests may be filed, but in our view action thereon must await at least the holding of oral argument in this matter at the end of July.

Accordingly, waiver is granted only to those of the 12 stations mentioned below who wish to present the program during this coming season.[1]

12. In view of the foregoing, IT IS ORDERED, That:

(a) Waiver of Section 73.658(k)(1) IS GRANTED, in case it should be necessary, to affiliates of and stations commonly owned with the NBC network, to carry to completion, through September 30, 1973, baseball games on Saturday afternoons starting no later than about 4 p.m. E.T.; coverage of the All-Star baseball game on July 24, 1973, including a pre-game show starting no earlier than 7:30 p.m. E.T.; and to carry on September 8, 1973, the "Miss America" program plus two hours of network programs regularly scheduled the same evening; and, for stations in the Mountain and Pacific time zones, coverage of baseball and AFC Exhibition football games starting at 8 or 9 p.m. E.T.; and to stations affiliated or under common ownership with the ABC network to carry to completion coverage of the U.S. Women's golf tournament on July 22, if such coverage is scheduled to end by 6 p.m. E.T., and the "Hall of Fame" football game on July 28 provided coverage starts at about 4 p.m. E.T.;

(b) Waiver of Section 73.658(k)(1) IS GRANTED to Station KOMO–TV, Seattle, Washington, and to Station KATU, Portland, Oregon, to carry to completion Monday night ABC football games starting no later than 7 p.m. E.T.;

(c) Waiver of Section 73.658(k) IS GRANTED to affiliated stations in Orlando-Daytona Beach (Florida) and Salt Lake City (Utah) markets, from such date before October 1, 1973, but not before September 1, as their network may designate as the opening date of its fall season; and

(d) Waiver of Section 73.658(k)(3) IS GRANTED to stations to present the first episode of the new "Ozzie's Girls" series provided they present the rest of the series; to Station WKRC–TV, Cincinnati, Ohio, to present one former ABC "special" program which was not presented in the Cincinnati market on the network; and to the following stations to carry the "National Geographic" program series until September 30, 1974, without its counting toward the three hours of permissible network and off-network programming during prime time each evening: KMGH, Denver, Colorado; WAGA–TV, Atlanta, Georgia; WBRC–TV, Birmingham, Alabama; WEWS–TV, Cleveland, Ohio; WHAS–TV, Louisville, Kentucky; WITI–TV, Milwaukee, Wisconsin; WJBK–TV, Detroit, Michigan; WLWD, Dayton, Ohio; WNYS–TV, Syracuse, New York; WRTV, Indianapolis, Indiana; WTIC–TV, Hartford, Connecticut; WTVJ, Miami, Florida.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] One of the stations making a waiver request for the coming year is WBRC–TV, Birmingham, Ala. (Taft Broadcasting Co.), which like two stations recently considered, has been carrying the program without requesting or getting a waiver. We expect a higher degree of conformance with, and attention to the requirements of, the Commission's rules in the future, although we recognize the licensee's arguments that it was misled in this case by a combination of trade press reports and salesmen's representations concerning the scope of the Commission's November decision relating to this program.

F.C.C. 73-698

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF PULASKI BROADCASTING CORP., LICENSEE OF RADIO STATIONS WPUV AND WPUV-FM, PULASKI, VA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 5, 1973)

BY THE COMMISSION: COMMISSIONER WILEY DISSENTING.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated April 19, 1972, addressed to Pulaski Broadcasting Corporation, licensee of Radio Stations WPUV and WPUV-FM, Pulaski, Virginia, and (2) the licensee's response of May 1, 1972 to the Notice of Apparent Liability.

2. The Notice of Apparent Liability for forfeiture in the amount of seven hundred and fifty dollars ($750) was issued in the case of Station WPUV for willful or repeated violations of Sections 73.93(e)[1] and 73.114(b) of the Commission's Rules respectively for failing to provide evidence indicating that a complete inspection of all transmitting equipment five days a week throughout the period May 1, 1971 to August 2, 1971 and failing to make log entries concerning the results of the required transmitter inspections. In the case of WPUV-FM the Notice of Apparent Liability was issued for violations of Sections 73.265(e)[2] and 73.284(b) of the Commission's Rules which were indentical with the violations specified in the case of Station WPUV and which occurred throughout the same period of time.

3. In response to the Notice of Apparent Liability the licensee, by its Chief Engineer (who is the owner of all issued and outstanding stock of the licensee), states in part as follows:

> As I noted in my earlier reply to the Commission, I was under the impression that the ruling applied to those stations not employing a full time first phone operator.
>
> The infractions that were committed were not done willfully, but through an error in judgment. I pride myself on being a responsible operator and in my 25 years as chief engineer this is my first major citation.

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[1] Former Section 73.93(e) became Section 73.93(j) effective as of July 14, 1972 and Section 73.93(j) was subsequently amended effective December 15, 1972, to the effect that transmitter inspections are now required once a week at an interval between successive required inspections of not less than 5 days, instead of once a day five days a week.

[2] Former Section 73.265(e) is now Section 73.265(h), which became effective as of December 15, 1972, amending Section 73.265(e) to the effect that transmitter inspections are now required once each week, at an interval between required successive inspections of not less than 5 days, instead of once a day five days a week.

The regulatory burden, imposed by all federal agencies, has become so extensive that it almost requires the services of a full time legal aid. This gentlemen, is out of the question for a small market radio station such as ours.

I have noticed in some previous actions by the Commission that some stations were first notified of a violation, then, if it was not corrected or rectified, a fine was imposed. A fine of $750.00 will definitely cause a financial hardship to our operations.

4. It is well established that licensees are expected to know and comply with the Commission's Rules, *J. C. Johnson, tr/as Lowndes County Broadcasting Co.*, 23 FCC 2d 91 (1970) and that a misinterpretation of the Rules will not relieve a licensee from liability for violation. *Hanson R. Carter*, 23 FCC 2d 511 (1970). We considered the licensee's financial condition and its prior record prior to the adoption of the Notice of Apparent Liability. We find that the violations occurred as above set forth and were repeated and it is unnecessary therefore to make an additional determination regarding willfullness. *Paul A. Stewart*, FCC 63–411, 25 RR 375. A finding of "repeated" violations pursuant to Section 503(b) of the Communications Act of 1934, as amended, does not require the Commission to first notify the licensee and give him an opportunity to correct the violations. *Friendly Broadcasting Co.*, FCC 62–276, 23 RR 893 (1962). In view of the above circumstances, we are not persuaded to remit or remitigate the forfeiture.

5. In view of the foregoing, IT IS ORDERED, That Pulaski Broadcasting Corporation, the licensee of Radio Stations WPUV and WPUV–FM, Pulaski, Virginia FORFEIT to the United States the sum of seven hundred and fifty dollars ($750) for repeated violation of former Sections 73.93(e), 73.114(b), 73.265(e) and 73.284(b) of the Commission's Rules.[3] Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules an Application for mitigation or remission of forfeiture may be filed within thirty (30) days from the date of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[3] Sections 73.93(e) and 73.265(e) are now respectively Sections 73.93(j) and 73.265(h).

104–000—73——4

F.C.C. 73-694

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
RE-REGULATION OF RADIO AND TELEVISION BROADCASTING

ORDER

(Adopted June 27, 1973; Released July 2, 1973)

BY THE COMMISSION:

1. As a result of the continuing study by its Task Force on re-regulation of broadcasting, the Commission has under consideration the matter of amending certain provisions in Parts 73 and 74 of its Rules and Regulations.

2. The amendments up-date a number of rules, delete parts of others which are no longer applicable, and eliminate various requirements which are no longer necessary.

3. The following changes are made for the reasons indicated:

(a) Section 73.23(c) is amended to delete the provision for 250 watt daytime stations on local channels to operate beyond the hours specified in their licenses (upon notification to the Commission and its district Engineer in Charge).

(1) No such stations are currently licensed. It appears that none would be sought because an applicant would not restrict himself to daytime operation when he can operate unlimited time with 250 watts on a local channel.

(b) Section 73.23(e) is amended to permit any specified hours station operating on a local channel, except one which shares time, to operate beyond the hours specified in its license in order to carry special events programming. Such extended operation has been limited to specified hours stations on local channels with a power of not in excess of 250 watts.

(1) Since specified hours stations on local channels are engineered for nighttime operation, no objectionable interference would result from such extended operation.

(c) Section 73.23(e) is amended also to make clear that a specified-hours station which operates nighttime beyond the hours specified in its license must use the station's authorized nighttime facilities.

(1) Previously, such provision was not expressly stated in the rule but was necessarily implied because prohibited interference could result from operating otherwise.

(d) Section 73.23(e) is amended also to delete the requirement that notification must be made to the Commission and its District Engineer

in Charge when a specified hours station operates beyond the hours specified in its license.

(1) The station's operating and program logs are an adequate record of the carrying of this type of extended special-events programming.

(e) For clarification purposes, the phrase "to carry special events programming" is added to Section 73.23(e) to define the programming which may be carried beyond the hours specified in such station's license.

(1) The rule has been administered in this context and is understood by the industry to mean programming of a special events nature.

(f) Each of the "Program Log" rules for AM, FM, Ed. FM and TV is amended to correct the reference therein to the number of the "Mechanical Reproduction" rule in accordance with which an entry must be made in the program log.

(1) By previous Order of November 1, 1972 (FCC 72–967), the "Mechanical Reproduction" rule for each of those services was deleted and a new rule, Section 73.1208, "Broadcast of Taped, Filmed or Recorded Material", was added to Subpart H, which is applicable to all broadcast services. Thus, in Sections 73.112(a)(4)(iv), 73.282(a)(4)(iv), 73.582(a)(2), and 73.670(a)(4)(iv) concerning program logs, the reference to §§ 73.118, 73.288, 73.588 and 73.653 is changed to 73.1208.

(g) Section 73.51(c)(2)(ii) is amended to make clear that the equipment performance measurements required therein are to be made at each power level at which the transmitter will be operated.

(1) As amended, the rule will reflect the manner in which it is administered, and any uncertainty generated by the cross-reference to § 73.47, contained therein, is eliminated.

(h) The provision in Section 73.582(a)(2) for entry of the "sponsor's name" in the program log of noncommercial educational stations is changed to the "name of any donor announced pursuant to Section 73.289."

(1) The term "donor" is more appropriate for noncommercial educational FM stations. Section 73.503(d) provides that such stations are subject to the provisions of 73.289 (announcement of sponsored programs) to the extent that they are applicable to the broadcast of programs produced by, or at the expense of, or furnished by, others. The name of the donor announced pursuant to 73.289 would be entered in the program log.

(i) References to political editorials in the title of § 73.598 and in the provisions of 73.598(b) pertaining to Noncommercial Educational FM stations are deleted.

(1) Section 399 of the Communications Act of 1934, as amended, (added by Public Law 90–129, November 7, 1967), provides that "No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office."

(j) Section 73.1207(c)(6) concerning prior approval of the Commission for rebroadcast of point-to-point messages originated by government and privately-owned non-broadcast stations is amended to provide for informal requests by telephone, followed within one week by written request and confirmation of consent by the originating station.

(1) The need to make provision for telephone requests for prior Commission approval was recently underscored by the earthquake in Nicaragua. During that disaster, a number of broadcast licensees and networks requested authority to rebroadcast point-to-point messages originated by privately-owned non-broadcast stations. In situations of this type, the time element frequently precludes the submission of written requests for prior approval of the Commission heretofore required by the rule.

(k) Section 73.935(b) concerning Emergency Broadcast System operation is amended to correct references therein to number of the rules regarding rebroadcasts of programs.

(l) The rebroadcast rules for each of the services, AM, FM, Ed. FM and TV, were deleted by previous Order of November 1, 1972, and a new rule § 73.1207 was added to Subpart H, which is applicable to all such stations. Thus, references in 73.935(b) to Sections 73.121(b) and (d), 73.219(b) and (d), 73.591(b) and (c), and 73.655 (b) and (c) are changed to 73.1207.

(l) Sections 74.13 and 74.14 are amended to delete the requirements that notification must be given to the Commission and its District Engineer in Charge when a permittee begins equipment tests (74.13(a), (b), (c), (d)) or program tests (74.14(a), (b), (c), (d) on any class of broadcast station listed in Part 74 (Experimental TV, Experimental Facsimile, Developmental, Remote Pickup, Aural STL and Intercity Relay, TV Auxiliary, TV Translators, Instructional Fixed, FM Translators and Boosters).

(l) Such notifications are no longer needed or useful for administrative purposes, and elimination of the requirement relieves both the permittee and the Commission of an unnecessary paperwork burden.

4. Amendments hereby adopted are editorial revisions, deletions, corrections and relaxations of existing rule provisions which we consider no longer necessary. They also conform language of certain rule provisions to established Commission policy and practice. We believe that they will inure to the benefit of many and to the detriment of none. We conclude that adoption of the amendments will better serve the public interest. Therefore, prior notice of rule making and public procedure thereon are unnecessary, pursuant to the Administrative Procedure and Judicial Review provisions of 5 U.S.C. 533(b)(3)(B).

5. Therefore, IT IS ORDERED, That, pursuant to Sections 4(i) and 303(j) and (r) of the Communications Act of 1934, as amended, Parts 73 and 74 of the Commission's Rules and Regulations are amended as set forth in the attached Appendix, effective August 13, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

1. Section 73.23(c) and (e) are amended to read as follows:
§ 73.23 Time of operation of the several classes of stations.

* * * * * * *

(c) Daytime permits operation during the hours between average monthly local sunrise and average monthly local sunset.

* * * * * * *

(e) Specified hours means that the exact operating hours are specified in the license. (The minimum hours that any station shall operate are specified in § 73.71.) Specified hours stations operating on local channels, except those sharing time with other stations may operate at hours beyond those specified in their licenses to carry special events programming. To the extent that such operation is conducted during the nighttime hours, the station's authorized nighttime facilities must be used.

2. Section 73.51(c)(2)(ii) is amended to read as follows:
§ 73.51 Antenna input power; how determined.

* * * * * * *

(c)(2)(ii) Where the proposed transmitter power output level(s) is less than 90 percent of nominal power, equipment performance measurements, as specified in § 73.47, conducted at each proposed power output level; in addition, the measurements and observations required by § 73.47(a)(1), (2), (3) and (5) for power output levels 10 percent above, and 10 percent below, the proposed output level(s), but at a modulation level of 95 to 100 percent only. Such measurements must demonstrate that, operating at the proposed power output level(s), the transmitter meets the performance requirements of § 73.40.

* * * * * * *

3. Section 73.112 is amended to read as follows:
§ 73.112 Program log.

* * * * * * *

(a)(4)(iv) An entry showing that broadcast of taped, filmed, or recorded material has been made in accordance with the provisions of § 73.1208.

* * * * * * *

4. Section 73.282 is amended to read as follows:
§ 73.282 Program log.

* * * * * * *

(a)(4)(iv) An entry showing that broadcast of taped, filmed, or recorded material has been made in accordance with the provisions of § 73.1208.

* * * * * * *

5. § 73.582 is amended to read as follows:
§ 73.582 Program log.

* * * * * * *

(a)(2) An entry briefly describing each program broadcast, such as "music", "drama", "speech", etc. together with the name or title thereof and the name of any donor announced pursuant to Section 73.289, with the time of the beginning and ending of the complete program. In addition, an entry reflecting the use of any taped, filmed, or recorded material, in accordance with the provisions of § 73.1208. If a speech is made by a political candidate, the name and political affiliations of such speaker shall be entered.

* * * * * * *

6. Section 73.598 and headnote are amended to read as follows:
§ 73.598 Personal attacks.

* * * * * * *

(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the

campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs).

* * * * * * *

7. § 73.670 is amended to read as follows:

§ 73.670 Program log.

* * * * * * *

(a)(4)(iv) An entry showing that broadcast of taped, filmed, or recorded material has been made in accordance with the provisions of § 73.1208.

* * * * * * *

8. § 73.935(b) is amended to read as follows:

§ 73.935 Day-to-day emergencies posing a threat to the safety of life and property; State-Level and Operational (local) Area-Level Emergency Action Notification.

* * * * * * *

(b) Stations originating emergency communications under this section shall be deemed to have conferred rebroadcast authority, as required by section 325(a) of the Communications Act, and § 73.1207(a) and (b) of the Commission's Rules and Regulations.

9. § 73.1207 is amended to read as follows:

§ 73.1207 Rebroadcast.

* * * * * * *

(b) No broadcasting station shall rebroadcast the program, or any part thereof of another U.S. broadcasting station without the express authority of the originating station. A copy of the written consent of the licensee originating the program shall be kept by the licensee of the station rebroadcasting such program and shall be made available to the Commission upon request. Stations originating emergency communications under a Detailed State EBS Operational Plan, shall be deemed to have conferred rebroadcast authority on other participating stations. The broadcasting of a program relayed by a remote pickup broadcast station (§ 74.401 of this chapter) is not considered a rebroadcast.

(c) The rebroadcast of time signals originated by the Naval Observatory and the National Bureau of Standards is permitted without further Commission authorization under the conditions set forth in Note 1 to this paragraph. The rebroadcast of National Weather Service (NWS) transmissions is permitted without further Commission authorization under the conditions set forth in Note 2 to this paragraph. Programs originated by the Voice of America (VOA) and the American Forces Radio and Television Service (AFRTS) cannot, in general, be cleared for domestic rebroadcast, and may therefore be rebroadcast only by special arrangement among the parties concerned. Except as otherwise provided by international agreement, programs originated by foreign broadcasting stations may be rebroadcast without the consent of the originating station. In the case of retransmissions of subcarrier background music and other FM multiplex subscription services, permission must first be obtained from the originating station. The retransmission of point-to-point messages originated by government and privately owned *non-broadcast* stations must be authorized by the Commission prior to retransmission; such authority may be requested informally by telephone, to be followed within one week with a written confirmation accompanied by the written consent of the originating station.

* * * * * * *

10. § 74.13 is amended to read as follows:

§ 74.13 Equipment tests.

(a) During the process of construction of any class of radio station listed in this part, the permittee, without further authority of the Commission, may conduct equipment tests for the purpose of such adjustments and measurements as may be necessary to assure compliance with the terms of the construction permit, the technical provisions of the application therefor, the technical requirements of this chapter, and the applicable engineering standards.

(b) Equipment tests may be continued so long as the construction permit shall remain valid.

(c) The authorization for tests embodied in this section shall not be construed as constituting a license to operate.

11. § 74.14 is amended to read as follows:

§ 74.14 Service or program tests.

(a) Upon completion of construction of a radio station in accordance with the terms of the construction permit, the technical provisions of the application therefor, technical requirements of this chapter, and applicable engineering standards, and when an application for station license has been filed showing the station to be in satisfactory operating condition, the permittee of any class of station listed in this part may, without further authority of the Commission, conduct service or program tests.

(b) Program test authority for stations authorized under this Part will continue valid during Commission consideration of the application for license and during this period further extension of the construction permit is not required. Program test authority shall be automatically terminated with final action on the application for station license.

(c) The authorization for tests embodied in this section shall not be construed as approval by the Commission of the application for station license.

F.C.C. 73R-237

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
RESORT BROADCASTING CO., INC., LEISURE CITY, FLA.	Docket No. 18956 File No. BPH-6545
FINE ARTS BROADCASTING CO., GOULDS, FLA.	Docket No. 18958
For Construction Permits	File No. BPH-6617

APPEARANCES

Morton L. Berfield and *Lewis I. Cohen*, on behalf of Resort Broadcasting Co., Inc.; *Eugene F. Mullin, Jr.*, *S. White Rhyne, Jr.* and *Sheldon C. Hofferman*, on behalf of Fine Arts Broadcasting Co.; and *Charles W. Kelley*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted June 18, 1973; Released June 26, 1973)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND KESSLER.

1. This proceeding involves the mutually exclusive applications of Resort Broadcasting Co., Inc. (Resort) and Fine Arts Broadcasting Co. (Fine Arts) for new FM broadcast stations to operate on Channel 252 at Leisure City, Florida, and Goulds, Florida, respectively.[1] By Order, FCC 70-918, released September 2, 1970, the Commission designated the applications for hearing on: (a) an areas and populations issue; (b) a Section 307(b) issue; and (c) a contingent comparative issue.[2] In an Initial Decision, FCC 71D-78, released November 1, 1971, Administrative Law Judge Jay A. Kyle recommended a grant of Resort's application, apparently on the basis of his determination that "Resort would serve 53,475 persons more than is proposed by Fine Arts." However, the Judge did not further articulate the basis for his conclusions and did not indicate whether he preferred the Resort application on 307(b) grounds or under the contingent comparative issue. Exceptions, a supporting brief and a request for oral argument were filed by Fine Arts, while Resort filed "protective exceptions" and a supporting brief.[3] The Board has reviewed the Initial Decision in light of the exceptions, the arguments of the parties[4] and our examina-

[1] Channel 252 is assigned to Homestead, Florida.

[2] A third application (that of Seven (7) League Productions, Inc.) for a station at Homestead, Florida, was also designated for hearing, but was dismissed with prejudice by the Administrative Law Judge, by Order, FCC 70M-1752, released December 23, 1970.

[3] The Broadcast Bureau interprets the Initial Decision as being based on the contingent comparative issue, as recommended in its proposed findings and conclusions. The Bureau states that it supports the Initial Decision and therefore has filed no exceptions to it.

[4] Oral argument was held before a panel of the Review Board on March 29, 1973.

tion of the record. We are in substantial agreement with the Presiding Judge's findings of fact. However, the Presiding Judge's conclusions are inadequate because the Judge failed to state the "basis" for them, as required by Section 557(c)(3)(A) of the Administrative Procedure Act.[5] In addition, we disagree with his ultimate recommendation to grant Resort's application and deny Fine Arts'. Rather, the Board believes that neither applicant is entitled to a Section 307(b) preference; that the case must be decided on the basis of the contingent comparative issue; and that, on that basis, the Fine Arts application is preferred.

SECTION 307(b) ISSUE

2. In the Board's view, the record evidence in this proceeding compels the conclusion that neither party is entitled to a preference under the transmission or reception aspects of the 307(b) issue. A comparison of the two communities under the transmission aspect of the issue provides no basis for a meaningful distinction. Both are small communities located in South Dade County and in the Miami Standard Metropolitan Statistical area. Neither Leisure City nor Goulds presently has any AM, FM or television facilities;[6] the communities are only 3.75 miles apart; and both applicants will cover each other's community with a 3.16 mv/m (city grade) signal.[7] The populations of Leisure City and Goulds (4,162 and 6,690, respectively) are substantially similar,[8] and their growth rates from 1960 to 1970 (*e.g.*, 38.6% for Leisure City and 30% for Goulds) are approximately the same. Moreover, neither community has formal boundaries, and the commercial, governmental and cultural attributes seem relatively equivalent, with neither applicant able to cite any characteristics which would establish a realistic difference.

3. Resort concedes that Goulds is the larger of the two communities, but claims that Fine Arts has not supplied adequate information concerning Goulds and its surrounding area, and, therefore, that it (Resort) must be preferred under the 307(b) issue. We disagree. While it is true that Resort has supplied a more detailed evidentiary showing concerning its proposed community than has Fine Arts, there is, in our view, sufficient information in the record to indicate the

[5] See *Central Coast Broadcasters, Inc. (KCOY–TV)*, 14 FCC 2d 985, 988, 14 RR 2d 575, 582, review denied FCC 69–614, released June 9, 1969, reconsideration denied 18 FCC 2d 794, 16 RR 2d 609 (1969), appeal dismissed, No. 23,422, D.C. Cir. August 19, 1971. *Cf. Greater Boston Television Corporation* v. *FCC*, 143 U.S. App. D.C. 383, 393, 444 F. 2d 841, 851, 20 RR 2d 2052, 2064, (1970), cert. denied 402 U.S. 1007 (1971).

[6] Contrary to Fine Arts' arguments, the fact that standard broadcast Station WRSD, Homestead, is located less than two miles from Leisure City is without significance here because there is nothing in the record to indicate that this station broadcasts any programs to meet the needs of Leisure City. Absent such evidence, no conclusions concerning its programming can be drawn. See *Hayward F. Spinks*, 34 FCC 974, 979, 24 RR 1055, 1056e (1963), review denied FCC 63–840, released September 20, 1963, and cases cited therein.

[7] In *Michigan Broadcasting Co.*, 20 RR 249 (1960), the Commission found that a determination under the 307(b) issue need not be dispositive of the question of which application is to be granted if the community selected as having the greater need would receive service not only from the applicant for that community, but also from the applicant for a community which was not preferred under the 307(b) issue.

[8] *Cf. Hayward F. Spinks, supra*, where the Board stated that on the basis of all the circumstances the difference in the populations of the two towns (3,198 to 1,618) was, "percentage-wise, [50%] not insignificant." However, there were a variety of other factors upon which the 307(b) determination was based, such as reception of primary service (12 to 3) and the station in the larger town provided service to 10,000 more people.

community characteristics of Goulds and, therefore, its need for a local broadcast outlet. In particular, Fine Arts Exhibit No. 3, which was submitted for the purpose of furnishing "a description of the communities of Goulds and Leisure City, and surrounding areas, and a comparison . . .", provides several pages of information relating specifically to Goulds, including its precise location, avenues of approach, possible studio locations, population composition, a brief description of governmental and civic institutions, etc. Furthermore, Allen Cohn, Fine Arts' president, 50% stockholder, and proposed general manager, testified at the hearing that the community of Goulds, which he visited in person, is residential with a "small downtown" composed of one to two dozen small "service type" stores and a post office and that most shopping is done by residents of Goulds at the Cutler Ridge Shopping Center—which is "within walking distance." In addition, we note that Resort's own Hearing Exhibit No. 4, entitled "Proposed Programming," contains a showing of some of the problems and needs of Goulds, thereby indicating some need, at least, for a local radio station. Significantly, neither Resort nor Fine Arts has provided figures showing sales volume for its community, and without such information, the fact that one community (Leisure City) has about twenty stores and the other (Goulds) about twenty-four is a meaningless distinction. *Brandywine Broadcasting Corp.*, 31 FCC 712, 22 RR 623 (1961), relied upon by Resort, does stand for the proposition that information as to the business, governmental and civic activities of an applicant's proposed community is required. But, in that case, "little or no" such information was supplied, whereas here the Board believes there is sufficient evidence in the record to indicate that Goulds is a small, relatively poor community in South Dade County. More important, however, is the fact that, as to the Section 307(b) comparison, neither applicant has shown any characteristics of its proposed community which would entitle it to a significant preference. "*What the Bible Says, Inc.*", 28 FCC 2d 551, 21 RR 2d 652, review denied 22 RR 2d 951 (1971), affirmed *per curiam sub nom. Oxbow Broadcasting Corp.* v. *FCC*, 25 RR 2d 2097 (D.C. Cir. 1972).

4. Furthermore, the Board does not believe that the importance of these two communities to their surrounding areas provides a basis for a 370(b) distinction, as the two applicants argue. On the one hand, Resort claims a preference for nearby Homestead Air Base and an adjacent migrant farmers labor camp, while on the other hand, Fine Arts claims a preference for nearby Cutler Ridge Shopping Center and its large commercial and growing governmental functions. In such circumstances, it is important to remember that the criterion is "the importance of communities to their surrounding areas," [9] not the importance of the surrounding areas, *per se*. Thus, it is not necessary for the Board to determine whether the Air Base is more important than the Shopping Center, but rather to determine which community is more significant to its surrounding area. A review of the record evidence leads the Board to conclude that neither community is more

[9] *Cosmopolitan Enterprises, Inc.*, 15 FCC 2d 650, 655, 14 RR 2d 1029, 1034 (1968). See *Radio Haddonfield, Inc.*, 37 FCC 168, 3 RR 2d 25 (1964).

important to its surrounding area than the other. In short, neither community appears to warrant a preference on the basis of its proximity to the surrounding area.

5. Turning to the reception aspects of the two proposals, it appears that the Presiding Judge halted consideration of this aspect of the 307(b) issue after he determined that Resort would serve 53,475 more persons than would Fine Arts. See paragraphs 11 and 12 of the Judge's conclusions. While this finding is correct and does, standing alone, represent a more efficient operation in terms of population coverage, the Board believes that the Section 307(b) reception aspects are far more complex. Both applicants would serve a common area containing 250,000 persons which is situated generally in urban areas located southwest of the city of Miami. This represents 81.5% of the population to be served by Resort and 98.75% of that by Fine Arts. As previously noted (paragraph 2, *supra*), each applicant would serve the other's community with a city grade signal of 3.16 mv/m. Resort would serve 56,000 persons living along the Atlantic Coast who would not be served by Fine Arts, and Fine Arts would serve 3,100 persons living in what can best be described as "the Everglades" [10] who would not be served by Resort. However, of the 56,000 persons in the area to be served by Resort but not by Fine Arts, all except 1,500 live in the community of Coral Gables, which already receives broadcast service from at least *nine* FM stations. The 1,500 persons living outside of Coral Gables receive at least four FM services. Therefore, none of the persons who would be served by Resort and not by Fine Arts can be seriously characterized as being "underserved." In such situations, it has consistently been Commissioin policy that if "there are abundant existing reception services available . . . neither applicant is entitled to a prefcrance on the basis of the reception aspects of its proposal." *Monroeville Broadcasting Co.*, 35 FCC 657 at 659–60, 1 RR 2d 607 at 610 (1963). See *Meredith Colon Johnston*, 33 FCC 2d 324, 23 RR 2d 671 (1972), affirmed 39 FCC 2d 782 (1973), reconsideration denied FCC 73–618, released June 19, 1973; *Kittyhawk Broadcasting Corp.*, 20 FCC 2d 1011, 18 RR 2d 125 (1970); *Dennis A. and Williard T. Sleighter* (WWDS), 6 FCC 2d 662, 9 RR 2d 320 (1967). Consequently, Resort's greater population coverage, standing alone, is clearly not sufficient to justify a grant of its application because such population is not presently underserved. The preference to which Resort is entitled for such coverage must be considered negligible in view of the plethora of services which that population now receives.

6. The record shows that 3,100 persons live in the area to be served by Fine Arts and not by Resort. No exception was directed to the Examiner's finding that this area receives one to nine FM services day and night, and from six to fourteeen aural (FM and AM) services daytime, and from three to twelve services nighttime. One FM service is available to 80 persons within 5 square miles, two to 240 persons in an area of 16 square miles, and three to 250 persons in an area of 15 square miles.

[10] The record does not make clear whether these areas are "Everglades" swamp, as stated by the Presiding Judge, or whether there is a possibility of future development or habitation.

However, the total (570 persons) is small, and they are served daytime by a minimum of five AM stations; therefore, only a very slight credit can be given for Fine Arts' proposed service to this area. Fine Arts' allegations concerning the future development of this sparsely settled area are far too speculative in nature to form a basis for a Section 307(b) preference. In sum, we conclude that, while Resort is entitled to a preference for more efficient coverage, such preference is negligible because the area is already well served and the Board therefore does not consider it decisive under the Section 307(b) issue. In view of all of the foregoing, the Board believes that neither applicant is entitled to a Section 307(b) preference and that the outcome of this proceeding must, therefore, be based on the comparative issue, to which we now turn.

CONTINGENT COMPARATIVE ISSUE

7. *Diversification of Control of the Mass Comunications Media.* Under the diversification criterion of the comparative issue, Fine Arts is entitled to a significant preference. While neither Fine Arts nor any of its stockholders has an interest in any other broadcast facility or other communications medium, Lester H. Allen, vice-president, treasurer and 50% stockholder of Resort, is also president, director and principal stockholder in Allen and Hurley Industrial Electronics Corporation, which in turn, owns Salt-Tee Radio, Inc., the licensee of a daytime only standard broadcast station (WSLT) in Ocean City-Somers Point, New Jersey, and of a Class A FM broadcast station (WSLT–FM) in Ocean City, New Jersey.[11] See *Lester H. Allen*, 32 FCC 2d 771 (1971). Allen also owns a 6% interest in a CATV firm having franchises in six New Jersey communities. In such circumstances, the Commission has consistently emphasized its policy favoring a wide diversity of ownership of communications media and a primary objective of this policy has been the promotion of a *maximum diffusion of control* of the mass communications media. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965); *Snake River Valley Television, Inc.*, 26 FCC 2d 380, 20 RR 2d 644 (1970). Significantly, none of the Fine Arts principals have any communications interests, whereas Lester Allen has interests in two New Jersey radio stations and a CATV system. While these interests are located a great distance from Florida, they cannot be ignored and, in comparison to the *complete* lack of media association on the part of Fine Arts, constitute a significant distinction between the applicants. See *Minshall Broadcasting Co., Inc.*, 15 FCC 2d 931, 15 RR 2d 394 (1969); *Theodore Granik*, 8 FCC 2d 1068, 10 RR 2d 659 (1967), review

[11] On March 14, 1973, Resort filed a petition for leave to amend its application to reflect the facts that WSLT–FM is now a licensed facility, that Allen and Hurley Industrial Electronics, Inc. has been renamed Allen Communications, Inc., and that Mr. Allen's ownership in the broadcast stations has been reduced from 42.55% to 36.1%. On March 23, 1973, the Broadcast Bureau filed comments on the petition, arguing that, because the dates of such changes were not included, the timeliness of the amendment could not be determined. On March 30, 1973, Resort supplemented its petition to include the relevant dates. The Board will grant the petition and accept the amendment for the limited purpose of allowing compliance with Rule 1.65. However, in order to avoid any comparative advantage to Resort, our acceptance will be conditioned on Allen's receiving no comparative advantage as a result; therefore, Lester H. Allen's former ownership percentages will be used in our analysis under the comparative issue.

denied 12 FCC 2d 208, 12 RR 2d 803, reconsideration denied 13 FCC 2d 344, 13 RR 2d 517 (1968). Accordingly, Fine Arts is entitled to a significant diversification preference because it would permit entry into the broadcast industry of an applicant without any other broadcast holdings.

8. *Best Practicable Service: Integration of Ownership and Management.* Resort is a corporation owned equally by Lester Allen and his son, Ronald Allen. The elder Allen's residence and principal place of business are in Trenton, New Jersey, and will remain there while Ronald will be general manager and supervise the day-to-day operation of Resort's proposed station. Resort argues that it is entitled to 100% integration credit on the ground that Ronald Allen and his father will be in almost daily telephone contact and will operate the station as a "family unit." In support, Resort relies upon *Cleveland Broadcasting, Inc.*, 7 FCC 2d 680, 9 RR 2d 941 (1967), set aside 12 FCC 2d 1008, 13 RR 2d 156 (1968). Fine Arts is a corporation, 50% of the stock of which is owned by Allen R. Cohn, who is president, treasurer and director. The remaining 50% is owned by seven other stockholders. Cohn proposes to serve full-time as general manager of Fine Arts' station; none of the other stockholders will participate in the station's day-to-day operations.

9. Initially, the Board believes that, contrary to Resort's contentions, both applicants are entitled to credit for equal 50% integration of ownership and management. In our opinion, the holding in the *Cleveland* case, which is cited by Resort, is not applicable here. In *Cleveland*, one of two mutually exclusive applicants for a new station was the corporate licensee of an already existing station in the same community. The record showed that the licensee had been under the practical control of the family since its existing station went on the air some twenty years earlier. Moreover, during those twenty years the members of the family had worked closely together and had consulted each other frequently in connection with their common broadcast interests. Additionally, in sharp contrast to the Allens, all three brothers were lifelong local residents and all had been prominent in local civic affairs. 7 FCC 2d at 697, 9 RR 2d at 963. The Review Board therefore held that one brother was to be viewed as a representative of his family's entire interest, rather than merely his own. 7 FCC 2d at 697, 9 RR 2d at 963.

10. The crucial importance of the precise factual situation in *Cleveland Broadcasting* was subsequently emphasized by the Board in *Triple C Broadcasting Corporation*, 16 FCC 2d 357, 15 RR 2d 515 (1969). There, the contention by an applicant that a son who proposed to be general manager of the station should receive integration credit for his nonparticipating mother's ownership interest was expressly repudiated. 16 FCC 2d at 362–63, 15 RR 2d at 523–24. *Cleveland Broadcasting* was held inapplicable, the Board recognizing the importance of the fact that in *Cleveland Broadcasting*, "the Miller stations had been a family operation over a number of years" and that this long association was "well known." 16 FCC 2d at 363–64, 15 RR 2d at 524. Such a situation was not present in *Triple C*, and it is not present

here.[12] Accordingly, Resort is only entitled to very slight credit for Lester Allen's broadcast experience. See *Policy Statement*, *supra*, 1 FCC 2d at 395, 5 RR 2d at 1909. The Board, therefore, concludes that both applicants be considered as having equal, 50% integration.

11. Next, a comparison of the relevant qualitative attributes of Ronald Allen's and Allen Cohn's backgrounds reveals there is little basis for preference. Although Ronald Allen holds a First Class Radio Telephone Operators license and has worked at several broadcast stations, his employment was always on a part-time basis and never at the management level.[13] The younger Allen plans to live in Leisure City and relies on Spanish language training that he believes will be useful in programming for the surrounding Spanish-speaking population. Under the circumstances, Allen's claim for a preference for his broadcast experience is questionable. First, he was employed only on a part-time basis and only for brief periods of time. Second, he has had no management experience. In addition, the *Policy Statement* states that "emphasis upon this element [past experience] could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage it will be deemed of minor significance." 1 FCC 2d at 396, 5 RR 2d at 1910. Thus, the Board believes that the broadcast experience of Ronald Allen is of minimal significance.[14] In addition, the fact that Ronald Allen proposes to live in Leisure City entitles Resort to a very slight preference when compared to Cohn's proposal to live in "South Dade County" rather than in Goulds proper. However, it should be remembered that neither Allen nor Cohn presently lives in or near the area and Cohn does plan to live in South Dade County.[15] Therefore, Allen's preference should be regarded as very slight. The Board does not believe any preference should be awarded to Resort for Ronald Allen's Spanish language training because neither the practical benefits of this ability nor a proven ability to use the language has been demonstrated on the record—at least to the extent that it would qualify for a preference under the integration criterion.

12. As for Fine Arts' showing under the qualitative attributes of the integration criterion, the Board believes that it, too, is barren of a basis for a preference. Cohn's "business experience" in general cannot provide a basis for integration credit, particularly when compared to Ronald Allen's experience in the field of broadcasting, meager as

[12] See also *Voice of Dixie, Inc.*, FCC 73R–201, 27 RR 2d 980, released May 31, 1973.

[13] He has worked at the following radio stations on a part-time basis and for very brief periods of time: WTTM, WAAT and WBUD, Trenton, New Jersey; WHWH, Princeton, New Jersey; WDOV–AM–FM, Dover, Delaware; and WFSO, Pinellas Park, Florida. Allen's duties at these stations included "engineering, announcing and news editing," but he did not have any management or programming responsibility. He has also worked for short stints as a substitute school teacher. His most recently listed employment was at a tennis and resort club in Connecticut.

[14] Fine Arts' reliance on language in the *Policy Statement*, that past broadcast experience can be examined only on an "offer of proof of particularly poor or good achievement," is misplaced. Evidence relating to the broadcast experience of a participating principal may be introduced in a comparative broadcast hearing. The weight to be accorded such experience, however, is dependent upon its qualities.

[15] Contrary to Resort's suggestions, the Board believes that Cohn's preference to live in the local area rather than Goulds is more properly due to the relatively poor economic conditions of the community, testified to by Cohn, than to any racist attitudes, as Resort implies. The Board's belief is buttressed by the involvement of Cohn and his wife in the civic affairs of their present community, Highland Park, Illinois, as well as in civil rights organizations and causes. See Fine Arts Exhibit No. 5; and Fine Arts' brief in support of exceptions to the Initial Decision, pp. 15–16.

it may be. See *Policy Statement*, *supra*, 1 FCC 2d at 396, 5 RR 2d at 1910. Nor does Cohn's involvement in the civic affairs of Highland Park, Illinois, provide a basis for an integration preference. The Commission is concerned with civic activity *only* insofar as it relates to "local residence." See *Policy Statement*, *supra*, 1 FCC 2d at 396, 5 RR 2d at 1910. In view of the virtual indistinguishability between the two integration proposals, then, Resort is entitled to only a very slight preference due to Ronald Allen's broadcast experience and proposed local residence.

13. *Best Practicable Service: Efficient Use of the Frequency.* Resort also claims a preference because it will serve 53,475 more persons (21%) than Fine Arts. While this factor is to be taken into consideration under the best practicable service criterion, the Board does not believe that Resort should be entitled to more than a very slight preference because the persons to be served already receive an abundance of radio service. See The *News-Sun Broadcasting Co.*, 24 FCC 2d 770, 19 RR 2d 942 (1970); and *Erway Television Corp.*, 8 FCC 2d 24, 9 RR 2d 1376 (1967). Also, Resort would serve 56,000 persons who are not served by Fine Arts. However, of the 56,000 persons served, 54,500 receive at least nine FM services and the remaining 1,500 receive at least four.[16] Moreover, the coverage factor is of relatively less significance in terms of the comparative analysis in that it is only one of many factors to be considered under the general category of "Best Practicable Service." *Cf. The News-Sun Broadcasting Co.*, *supra*. In conclusion, then, Resort is entitled to very slight preference under the best practicable service criterion.

14. *Summation.* In sum, the Board concludes that no 307(b) preference can be awarded either applicant and that under the comparative issue, Fine Arts' proposal is preferred. Fine Arts' preference is based on a balancing of its significant preference for diversification versus Resort's very slight preference for proposing to provide the best practicable service. Diversification of media control is, itself, a primary Commission objective, whereas integration of ownership and management and efficient use of the frequency are two of several indicants of the Commission's other primary objective of obtaining the best practicable service to the public. Thus, in the past, greater significance has been assigned the diversification criterion. See *e.g.*, *Lorain Community Broadcasting Co.*, 13 FCC 2d 106, 13 RR 2d 382, reconsideration denied 14 FCC 2d 604, 14 RR 2d 155, rehearing dismissed 15 FCC 2d 388, 14 RR 2d 968 (1969), review denied 18 FCC 2d 686, 16 RR 2d 946 (1969), affirmed *sub nom. Allied Broadcasting, Inc.* v. *FCC*, 140 U.S. App. D.C. 264, 435 F. 2d 68, 19 RR 2d 2071 (1970); *Lewis Broadcasting Corp.*, 11 FCC 2d 889, 12 RR 2d 627 (1968). In addition, the best practicable service preference accorded Resort is "very slight," whereas Fine Arts, which also proposes to integrate a substantial stockholder full-time, is entitled to a significant diversification preference. Thus, on the basis of the relative importance of the preferences awarded and the margin of credit accruing to each applicant under its preference, the Board concludes that a grant of the Fine Arts'

[16] See paragraph 5, *supra*.

application would better serve the public interest, convenience and necessity. Consequently, the Fine Arts' application will be granted and the Resort application denied.

15. Accordingly, IT IS ORDERED, That the petition for leave to amend, filed March 14, 1973, by Resort Broadcasting Co., Inc., IS GRANTED subject to the condition that no comparative advantage shall accrue as a result thereof, and the amendment IS ACCEPTED subject to the same condition;

16. IT IS FURTHER ORDERED, That the application of Fine Arts Broadcasting Co. (BPH-6617) for a new FM broadcast station at Goulds, Florida, IS GRANTED, and that the application of Resort Broadcasting Co., Inc. (BPH-6545) for a new FM broadcast station at Leisure City, Florida, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER, *Member, Review Board.*

APPENDIX

RULINGS ON EXCEPTIONS OF FINE ARTS BROADCASTING CO., INC.

Exception No.	*Ruling*
1, 3	Granted to the extent indicated in paragraph 5 of this Decision; denied in all other respects as being of no decisional significance.
2	Granted. The population figure of 34,524 is at variance with the correct figure of 54,500. The latter figure was expressly agreed upon by engineers for the applicants and the Broadcast Bureau, with the engineering exhibits being updated to reflect this unanimity. (Tr. 205–08; Fine Arts Exhibit No. 14; Resort Exhibit No. 6.)
4, 9, 20	Denied as being of no decisional significance.
5, 8, 10, 21	Denied. The findings of the Administrative Law Judge accurately and adequately reflect the record evidence.
6	Denied. See footnote 6 of this Decision.
7	Granted. The fifth sentence of paragraph 5 of the Initial Decision is unclear but the thought contained therein is comprehensible, *i.e.*, reactivation of the Air Base substantially changed the nature of this retirement community.
11	Denied. See footnote 10 of this Decision.
12	Granted. See paragraph 10 of this Decision.
13	Denied. The Presiding Judge did not take notice of the information contained in Allen's application to acquire Salt-Tee (BTC–6591); therefore, such information is not a part of the record and cannot be considered by us.
14	Granted. See footnote 11 of this Decision.
15	Granted. See paragraph 7 of this Decision.
16	Granted in substance. See paragraph 9 of this Decision. Lester Allen's interest in helping his son "achieve some success in the broadcasting business" is without decisional significance.
17	Granted to the extent that Ronald Allen's past employment experience is indicated in paragraph 11 of this Decision; denied in all other respects as being without decisional significance.
18	Denied. The Board does not agree that Ronald Allen's stated intention to move to Leisure City in the event of a grant is discredited by the events cited by Fine Arts. The attempt to establish legal residence in Florida for reasons unrelated to this proceeding does not necessarily undermine Allen's testimony at the hearing.
19	Granted in substance. See paragraphs 9 and 10 of this Decision.
22	Granted. See paragraph 1 of this Decision.
23, 24, 25	Granted. See paragraph 5 of this Decision.
26	Denied. See paragraph 6 of this Decision.
27	Denied. See paragraphs 2, 3 and 4 of this Decision.
28	Granted in part and denied in part. See paragraphs 5 through 11 of this Decision.
29	Granted. Although these conclusions are correct they are also incomplete and, for that reason, misleading. See paragraphs 1 through 7 of this Decision, as well as our rulings on Exceptions 1–3, supra.
30	Granted. Ronald H. Allen is president of Resort.
31	Granted. See paragraph 7 of this Decision.
32, 33	Granted. See paragraph 9 of this Decision.

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Exception No.	*Ruling*
34	Denied. The fact that Ronald Allen has no record of civic activity does not detract from Resort's integration proposal. Also, there is no "substantial basis" for discrediting his intention to move to Leisure City. See our ruling on Exception 18, supra.
35	Granted. The correct call letters are "WFMT."
36	Denied. See paragraph 12 of this Decision.
37	Denied. In none of the rulings excepted to did the Presiding Judge abuse his discretion.
38	Granted for the reasons stated in the whole of this Decision.

RULINGS ON "PROTECTIVE EXCEPTIONS" OF RESORT BROADCASTING CO., INC.

1, 2, 3, 5, 6, 7, 13	Denied. The Presiding Judge's findings accurately and adequately reflect the record.
4	Denied. See paragraph 4 of this Decision.
8	Denied as being without decisional significance.
9	Denied. See paragraph 3 of this Decision.
10	Denied. See paragraph 4 of this Decision.
11	Denied as being without decisional significance.
12	Granted in substance. See paragraph 11 of this Decision.
14	Denied. See paragraphs 8, 9 and 10 of this Decision.
15	Granted to the extent that, except for Allen Cohn, none of the other Fine Arts' stockholders will be involved in the operation of the station, either full-time or part-time; denied in all other respects as being of no decisional significance.
16	Denied for the reasons stated in the whole of this Decision.

F.C.C. 71D–78

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
RESORT BROADCASTING CO., INC., LEISURE CITY, FLA.	Docket No. 18956 File No. BPH–6545
FINE ARTS BROADCASTING CO., GOULDS, FLA.	Docket No. 18958
For Construction Permits	File No. BPH–6617

APPEARANCES

Morton L. Berfield, Esq. and *Edward R. Wholl, Esq.*, on behalf of Resort Broadcasting Co., Inc.; *Eugene F. Mullin, Jr., Esq.* and *S. White Rhyne, Jr., Esq.*, on behalf of Fine Arts Broadcasting Co.; *Alan C. Campbell, Esq.*, on behalf of Seven (7) League Productions, Inc.; and *Charles W. Kelley, Esq.*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER JAY A. KYLE

(Issued October 28, 1971; Released November 1, 1971)

PRELIMINARY STATEMENT

1. This proceeding involves the applications of Resort Broadcasting Co., Inc. (Resort) and Fine Arts Broadcasting Co. (Fine Arts) for a new FM Broadcast Station to operate on the frequency of 98.3 mHz, Channel 252. Resort proposes to serve Leisure City, Florida while Fine Arts desires to serve Goulds, Florida. As the applications are mutually exclusive in that operating by each as proposed would result in mutually destructive interference, the Commission designated the applications for hearing in its designation order released September 2, 1970 (FCC 70–918).

2. At the time the applications were designated for hearing, a third party, Seven (7) League Productions, Inc. (Seven (7) League) was an applicant in this proceeding and in its proposal, it was seeking a station for Homestead, Florida. Seven (7) League filed a petition to dismiss its application in December, 1970 and through an order released December 23, 1970, the Hearing Examiner granted the Seven (7) League petition and dismissed its application with prejudice. With the dismissal of the Seven (7) League application, only the following issues remained to be considered, which remaining issues have been renumbered for the sake of convenience and in the interest of brevity. They are as follows:

1. To determine the areas and populations which would receive FM service of 1 mv/m or greater intensity from the respective proposals together with the availability of other primary aural services in such areas.

2. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between applications should not be based solely on considerations relating to Section 307(b) which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if (either) of the applications for construction permit should be granted.

3. A prehearing conference was held on October 14, 1970 and the evidentiary hearings were held on March 8, 9, April 15, May 18 and June 18, 1971. The record was closed on May 18, 1971 but was subsequently reopened on June 18, 1971 and again closed on July 9, 1971. Proposed findings of fact and conclusions of law were filed on behalf of the Broadcast Bureau on August 10, 1971 and Resort and Fine Arts filed their proposed findings of fact and conclusions of law on August 27, 1971. On October 4, 1971 Resort filed its reply findings and the following day, October 5, 1971, Fine Arts filed its reply.

FINDINGS OF FACT

4. Resort and Fine Arts each request a construction permit for a new Class A FM Broadcast Station to operate on 98.3 mHz with effective radiated power of 3 kw and an antenna height above average terrain of 300 feet. Resort proposes to operate in Leisure City, Florida and Fine Arts in Goulds, Florida. The communities are 3.75 miles apart at the closest limits and thus the two applications are mutually exclusive.

LEISURE CITY, FLORIDA

5. Leisure City, Florida is an unincorporated area located in South Dade County in the heart of the Redlands agricultural area famous for its winter fruits and vegetables. Leisure City was established in the early 1950's through the construction of approximately 1500 homes by a development company. The purpose of the construction program for Leisure City was intended to be a planned community for retired people. The plans of Leisure City, however, were substantially altered by the Korean War and the reactivation of Homestead Air Force Base in 1955 under the Strategic Air Command. The result was that the city planned as an exclusive retirement area although it has a higher than average of persons over 65, the community was drastically changed in nature resulting from a substantial younger population due to off-base housing of military personnel. The 1960 Census showed Leisure City with a population of 3,001 but in the following ten years its population grew to 4,162 persons resulting in a net increase of population of 38.6%. The Dade County Zoning Board has recently approved a construction project by the Department of Housing which will result in the construction of 120 town houses for low income families to be located on U.S. Highway No. 1. Completion of this project is expected by May 1972. Leisure City is located 18 miles southwest of Miami, Florida at the closest limits and is within the Miami Standard Metropolitan Statistical Area which is comprised of Dade County with a

population of 1,267,792 persons.[1] There are no aural or television broadcast stations that operate in Leisure City. An exhibit tendered by Resort from an estimate of the Leisure City Civic Association is that approximately 40% of Leisure City's population is comprised of military personnel and their dependents. The evidence points to the fact that undoubtedly the strongest economic force to the business life of Leisure City is from the military and civilian personnel of Homestead Air Force Base. There are four churches in Leisure City, as well as a civic association, a women's club, a Cub Scout troop, and a Girl Scout troop. Leisure City has the sort of businesses one would ordinarily expect in a small community such as Leisure City.

6. The proposed coverage of Resort is as follows:

Contour (mv/m)	Population	Area (square miles)
1.0	[2] 306,575	568

[2] Of this population, 199,451 reside in urban areas and 124,665 reside in rural areas.

7. FM Stations WYOR, Coral Gables and WJHR, WLYF and WIGL, Miami, Florida, provide 1.0 mv/m FM service to all of the area within the proposed Resort 1.0 mv/m contour and 8 others serve portions. A minimum of 4 and a maximum of 11 FM services are available, within the proposed 1.0 mv/m contour. Considering AM primary service also, at least 7 aural services are available within the proposed 1.0 mv/m contour day and night. The community of Leisure City receives 1.0 mv/m FM service from the four stations serving all of the proposed service area and at least 8 aural services day and night.

GOULDS, FLORIDA

8. Goulds, Florida had a 1970 population of 6,690 and lies 13 miles southwest of Miami, Florida within the Miami Standard Metropolitan Statistical Area. No AM, FM or TV stations operate in Goulds. Goulds is a well-established community which originally operated around a railroad shipping siding. While Goulds is not incorporated and its boundaries are not formally defined, it is generally regarded as comprising that area along both sides of U.S. Highway No. 1 west of 112th Avenue (also known as Allapattah Road) and running approximately to 127th Avenue known as Burr Road. While, as mentioned, Goulds is not incorporated, meetings have been held with county officials with regard to the formal incorporation of Goulds as a city. It now is primarily a residential area with small business establishments. However, Goulds is located immediately adjacent to a large shopping center which has in recent years become a commercial and governmental hub of South Dade County. This center lies directly between Goulds and another residential community to the east and is known as Cutler Ridge. There has been developed the Cutler Ridge Shopping Center and is equally as close to Goulds as to Cutler Ridge

[1] All population figures are from the 1970 U.S. Census Advance Reports unless otherwise observed.

and has become a natural commercial center of Goulds and the surrounding area of South Dade County. The shopping center has retail sales of over $10,000,000 annually with about 600 employees. Located in the Cutler Ridge Shopping Center is the site of the Social Security Office and a branch of the Dade County Public Library with more than 25,000 volumes. The South Dade Governmental Building Complex under construction is adjacent to the shopping center and to Goulds. This new complex will contain courts, police and fire headquarters, a major hospital, an auditorium, a new regional library, separate buildings for the departments of public works and transportation and other administrative offices, all of which will serve the South Dade County area. This applicant points out that there is no other similar governmental complex south of Miami.

9. The proposed coverage of Fine Arts is as follows:

Contour (mv/m)	Population	Area (square miles)
1.0	[2] 253,100	630

[2] Of this population, 147,134 persons reside in urban areas including 6,374 persons in Coral Gables.

10. FM Station WIGL, Miami, Florida, provides 1.0 mv/m service to all of the area within the proposed Fine Arts 1.0 mv/m contour and 10 others serve portions. A minimum of one and a maximum of 10 FM services are available within the proposed 1.0 mv/m contour. One FM service is available to 80 persons in an area of five square miles; two are available to 240 persons in an area of 16 square miles; three, to 250 persons in an area of 15 square miles and four, to 35,500 persons in an area of 28 square miles. The areas receiving one, two or three FM services are located in the Everglades.

11. Five stations provide AM primary service to all of the urban and rural areas within the proposed 1.0 mv/m contour daytime. Thus, there are more than five aural, both FM and AM, services available daytime to all of the proposed FM service areas. At night, two stations provide AM primary service to all of the area within the proposed 1.0 mv/m contour and two stations serve portions so that from three to 13 aural services are available within the proposed service area. The area receiving three aural services includes 80 persons in an area of five square miles and the area receiving four includes 240 persons in an area of 16 square miles. These sparsely served areas are located in the Everglades. The community of Goulds receives six to eight FM services (1.0 mv/m or greater) and 10 or more aural services day and night.

OWNERSHIP, CONTROL AND MANAGEMENT OF THE APPLICANTS

12. Resort is a corporation. Lester H. Allen owns 50% of the stock and the remaining 50% is held by his son, Ronald H. Allen. Ronald is president and secretary of the corporation, while the father is vice-president and treasurer.

13. Lester H. Allen attended elementary and high school in Trenton, graduating from Rider College in 1930. In 1939 he became a civilian engineer with the Army Signal Corps at Fort Monmouth, N.J. holding that position until 1942 when he was commissioned as an officer in the Army Air Force. From 1942 to 1945 Allen was the officer in charge of the Guided Missile Development Section of the Army Air Force. Besides his interest in Allen and Hurley Industrial Electronics Corporation, an electronic wholesale supply firm in Trenton, Allen owns a 6% interest in Crosswicks Industries, Inc., a CATV firm having franchises at several places in New Jersey. He has been active in the affairs of his community, State and country.

14. Lester H. Allen also is an individual applicant for a construction permit for a new FM facility in Ocean City, N.J. That application was granted in an Initial Decision released December 18, 1969 (FCC 69D–68). The other applicaction for that facility was filed by Salt-Tee Radio, Inc. Since both of these mutually exclusive applicants had been found qualified to operate as proposed, the acquisition of Salt-Tee by Allen and Hurley Industrial Electronics Corporation removes any remaining conflict between those applications and clears the way for the grant of one of them. In either case, Lester H. Allen will be the controlling owner.

15. Lester Allen has had substantial interest in radio broadcasting both as a "ham" radio operator and as a volunteer broadcaster on commercial radio. He received an amateur radio license in 1930 and since then has received an advanced license. Prior to World War II, Lester Allen was employed as a civilian radio engineer at Fort Monmouth, New Jersey. In the early 1960's he acted as Director of Communications for the Trenton Civil Defense Organization. More recently, Lester Allen served as a part-time moderator and radio personality on WBUD–AM and WBJH–FM in Trenton, New Jersey. If the application of Resort is granted, Lester H. Allen will not move to the area but has stated that he will visit the station at least four to six times a year and actively participate in basic policy decisions. Respecting these decisions he will be in touch with Ronald Allen several times a week in regard to such matters.

16. Ronald H. Allen was born in Trenton, New Jersey on August 3, 1942. He attended Waynesburg College, in Waynesburg, Pennsylvania, from which he graduated with a Bachelor of Arts degree in history and education in 1966. In 1965 he spent the summer in Mexico City studying Spanish at the University of Mexico, to be followed by post-graduate courses in education at Trenton State College, Trenton, New Jersey and in 1968, post-graduate courses in sociology at Chesapeake College in Wye Oak, Maryland and political geography at the University of Maryland in College Park. Ronald H. Allen would move to Leisure City to become General Manager and would represent his father's interest in the management and operation of the station. He testified that he would be in touch with his father almost daily by telephone.

17. Fine Arts is a corporation with Allen R. Cohn owning 50% of the stock. Cohn is president, treasurer and director of Fine Arts, while his wife, Avis Cohn, serves as vice-president, secretary and director.

Robert L. Haag who owns 20% of the stock is a director, and of the remaining six other stockholders, none has more than a 6% interest.

18. Allen R. Cohn was born in Chicago on June 18, 1934 and attended the University of Illinois and Roosevelt University, receiving a Bachelor of Arts degree in 1956 from Roosevelt. In 1956–57 he attended graduate school in psychology at Ohio State University. Since 1957 he has been continuously employed in a family owned firm which distributes electrical equipment. A salesman from 1957 to 1960, he became sales manager in 1960 and served in that post until 1966 and then was promoted to vice-president and sales manager in 1966, which position he still retains. He owns 45% interest in Perry Electric Company. He and his wife, Avis, live in Highland Park, a suburb of Chicago. He has been active in various civic and community organizations and he, as well as Mrs. Cohn, have had an affiliation with the Chicago Symphony Orchestra and the Lyric Opera of Chicago. Mrs. Cohn, in recent years, has been a member of the Highland Park School Board and various other organizations including the Art Institute of Chicago.

19. If a grant is made to Fine Arts, Cohn and his wife, Avis, will move their home and family to South Dade County and will become residents of Dade County. Both of them will be active in the operation of the station on a day-to-day basis. Neither of the Cohns have had experience in the broadcasting industry although Cohn has been in consultation with Ray Nordstrand of WFMT, Chicago, relative to the operation of an FM radio station, including broadcasting, advertising, soliciting and physical management of the station. Nordstrand will be a consultant to the Cohns on a paid basis. Outside of Mr. and Mrs. Cohn, none of the other stockholders of Fine Arts will be integrated into the management of the station on a full-time basis.

20. Both applicants propose to serve urban areas developing along the Atlantic coast southwest of Miami, Florida. This includes the following communities:[4]

Community:	*Total population*
Coral Gables	42,494
Cutler Ridge (U)	17,441
Florida City	5,133
Goulds (U)	6,690
Homestead	13,674
Homestead Base (U)	8,257
Kendall (U)	35,497
Leisure City (U)	4,162
Naranja (U) (1960 U.S. census)	2,509
Perrine (U)	10,257
Richmond Heights (U)	6,663
South Miami	19,571
South Miami Heights (U)	10,395
Sweetwater	3,357
Westwood Lakes (U)	12,811

Both applicants serve all of the above communities except for Coral Gables and South Miami. Resort serves 25,241 persons (60%) in Coral

[4] Naranja, Homestead, Leisure City and Homestead Base now receive 4 FM services (1.0 mv/m or greater). All communities receive from 4 to 11 FM services, at least 5 AM primary services daytime, at least 4 AM primary services nighttime, and at least 8 aural services day and night.

Gables compared to 6,374 persons (15%) by Fine Arts. Resort serves all of South Miami compared to 3,914 persons therein (20%) by Fine Arts. The net difference between the 306,575 persons proposed to be served by Resort and the 253,100 persons proposed to be served by Fine Arts is 53,475 persons, of which 34,524 can be accounted for in Coral Gables and South Miami alone.

21. In terms of area, the greater portion of each applicant's service area would be duplicated by the other. The population in the common area is 250,000 representing 81.5% of the population proposed to be served by Resort and 98.75% of the population proposed to be served by Fine Arts. The proposed 3.6 mv/m contour (City Grade) contour of each applicant would encompass the community of the other.

22. The Resort site is located about four miles west of Goulds and the Fine Arts site lies 3.4 miles west of the Resort site. The proposed 1.0 mv/m contour of each applicant has a circular radius of 14.5 miles and the two service areas are offset by the 3.4 miles separation between sites. Resort would thus serve 56,000 persons not served by Fine Arts along the Atlantic coast mostly in the South Miami and Coral Gables areas and Fine Arts would serve 3,100 persons not served by Resort in the Everglades. The 56,000 persons receive at least five FM and eight aural (FM plus AM) services night and day. The 3,100 persons receive from one to nine FM services day and night and from six to 14 aural services daytime and from three to 12 aural services nighttime.

CONCLUSIONS

1. Resort Broadcasting Company, Inc. seeks a construction permit for a new Class A FM Broadcast Station operating on the frequency of 98.3 mHz. Channel 252, with an effective radiated power of 3 kw and an antenna height above average terrain of 300 feet, at Leisure City, Florida.

2. The other applicant here involved, Fine Arts Broadcasting Co., seeks the same facility at Goulds, Florida. These communities are but 3.75 miles apart and the applications are mutually exclusive.

3. Leisure City is an unincorporated area located in South Dade County in the heart of the Redlands agricultural area famous for its winter fruits and vegetables. The population of Leisure City in 1970 was 4,162 persons reflecting a net increase of population over 1960 of 38.6%. Leisure City is located 18 miles southwest of Miami and within the Miami Standard Metropolitan Statistical Area comprised of Dade County with a population of 1,267,792 persons according to the 1970 U.S. Census. There are no aural or television broadcast stations that operate in Leisure City. Resort would serve 306,575 persons in an area of 568 miles within its 1.0 mv/m contour. There are four FM stations serving all of the area, eight serve portions and from four to 11 serve various parts of the area. At least seven aural services are available to the area day and night; four FM stations serve Leisure City and at least eight aural services are available to the community day and night. The evidence points out that the strongest economic force to the business life of Leisure City as well as the social impact thereof is from the military and civilian personnel of Homestead Air Force Base

which was reactivated in 1955. The evidence in this hearing is that approximately 40% of Leisure City's population is comprised of military personnel and their dependents.

4. Goulds, Florida lies within 13 miles southeast of Miami, Florida within the Miami Standard Metropolitan Statistical Area. Its 1970 population was 6,690 persons. Goulds is not incorporated and its boundaries are not formally defined. However, there is evidence that meetings have been held with the County officials looking to the formal incorporation of Goulds as a city.

5. Fine Arts would serve 253,100 persons in an area of 630 square miles within the proposed 1.0 mv/m contour. One FM station serves all of the area and ten serve portions and from one to ten serve any one portion. One FM service is now available to 80 persons in an area of five square miles; two to 240 persons in 16 square miles; three to 250 persons in an area of 15 square miles and four to 35,000 in an area of 28 square miles. The areas receiving one, two or three FM services are located in the Florida Everglades. Five stations provide AM services to all of the urban and rural areas within the proposed 1.0 mv/m contour daily. At night two stations provide AM primary service to all of the area within the proposed 1.0 mv/m contour and two stations serve portions so that from three to 13 aural services are available within the proposed area. The community of Goulds receives six to eight FM services and 10 or more aural services day and night.

6. Both applicants serve a common area including 250,000 persons situated generally in urban areas located southwest of Miami. These persons represent 81.5% of Resort's total population and 98.75% of Fine Arts population. Each applicant would serve the other's community with a city grade signal of 316 mv/m. Resort would serve 56,000 persons not served by Fine Arts along the Atlantic Coast and Fine Arts would serve 3100 persons not served by Resort in the Everglades.

7. Resort is a corporation owned 50% by Lester H. Allen and the remaining 50% by his son, Ronald H. Allen. The son is vice-president, and secretary of the corporation, while the father is vice-president and treasurer.

8. Lester Allen has had substantial interest in radio broadcasting both as a "ham" radio operator and as a volunteer broadcaster on commercial radio. He received an amateur radio license in 1930 and since then has received an advanced license. Prior to World War II, Lester Allen was employed as a civilian radio engineer at Fort Monmouth, New Jersey. In the early 1960's he acted as Director of Communications for the Trenton Civil Defense Organization. More recently, Lester Allen served as a part-time moderator and radio personality on WBUD–AM and WBJH–FM in Trenton, New Jersey.

9. If the application of Resort is granted, Lester H. Allen will not move to the area but has stated that he will visit the station at least four to six times a year and actively participate in basic policy decisions. Respecting these decisions he will be in touch with Ronald Allen several times a week in regard to such matters. On the other hand, Ronald H. Allen would move to Leisure City to become general manager and would represent his father's interest in the management and

operation of the station. He testified that he would be in touch with his father almost daily by telephone.

10. Allen R. Cohn who owns 50% of the stock of Fine Arts and is president, treasurer and director of that corporation, along with his wife, Avis, who will act as vice-president, secretary and director of Fine Arts, will move their home and family to South Dade County and both of them will be active in the operation of the station on a day-to-day basis. Neither Mr. or Mrs. Cohn have had experience in broadcasting, although Cohn has been in consultation with Ray Nordstrand, of WFTM, Chicago, relative to the operation of an FM station.

11. In summation, under the proposals embodied in this proceeding, Resort would serve 306,575 persons while Fine Arts would serve but 253,100 or, putting it another way, Resort would serve 53,475 persons more than is proposed by Fine Arts. This means that the Resort coverage in terms of population would be over 21% greater than the plan of Fine Arts.

12. In view of the foregoing findings of fact and upon careful evaluation of the entire record in this proceeding, it is concluded that a grant of the application of Resort Broadcasting Co., Inc. for a construction permit for a new FM broadcast station to operate on the frequency of 98.3 mHz (Channel 252) at Leisure City, Florida will serve the public interest, convenience and necessity while a grant to Fine Arts Broadcasting Co. for the same facility at Goulds, Florida will not serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by either applicant or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Commission's Rules, the application of Resort Broadcasting Co., Inc. for a construction permit for a new FM broadcast station to operate on the frequency of 98.3 mHz (Channel 252) at Leisure City, Florida IS GRANTED and the application of Fine Arts Broadcasting Co. for the same facility at Goulds, Florida, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
JAY A. KYLE, *Hearing Examiner.*

F.C.C. 73-645

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PRACTICES OF LICENSEES AND NETWORKS IN CONNECTION WITH BROADCASTS OF SPORTS EVENTS	Docket No. 19773

NOTICE OF INQUIRY

(Adopted June 13, 1973; Released June 26, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT; COMMISSIONER REID CONCURRING AND ISSUING A STATEMENT.

1. The Commission has from time to time received inquiries and allegations regarding the practices of broadcast licensees and networks in connection with the broadcast of sports events. Certain of the allegations, if true, raise questions as to whether some licensees, in broadcasting sports events, have (i) relinquished control over their programming; (ii) subordinated the public interest to their private interest; (iii) deliberately suppressed or distorted news or acquiesced in the use of their facilities by others for such practices; or, (iv) failed to comply with the requirements of Section 317 (b) or (c) of the Communications Act of 1934, as amended. It is the purpose of this Inquiry to obtain information and comments on the practices and alleged practices summarized hereinafter and on the application of the Communications Act of 1934, as amended, and the Commission's Rules and policies to such practices.

2. According to information in the possession of the Commission many professional and amateur sports organizations, including leagues, clubs, colleges and the National Collegiate Athletic Association, at present require or have in the past required in their contracts with networks and stations covering sports broadcast rights, that the leagues, clubs, etc., shall have the power of veto over selection of announcers who cover their athletic events. In many cases, the announcers also are hired and paid by others than the licensees; e.g., sports clubs, colleges, sponsors of the sports broadcasts; in some cases the announcers are fulltime, salaried officials or employees of the clubs or colleges.

3. As the result of such arrangements, some licensees may have relinquished substantial control over their sports programs. In some instances announcers allegedly have been forced by professional club owners to misrepresent facts to the radio audience (e.g., whether conditions or size of the crowd at a sports event), or to refrain from expressing criticism of teams, players or those officiating at games. It

also has been alleged that because of control of sports promoters over announcers, some announcers have been forced to express support for professional sports organizations in disputes between clubs or leagues and players' organizations, or at least to refrain from expressing support for the players' organizations. Another allegation is that one baseball announcer was discharged by the club employing him because he disobeyed the club owner's order to ridicule a certain person on the air.

4. Many sports followers have been aware for years that some sports announcers were the "Voice" of the club or organization whose games they broadcast and therefore could be expected to exhibit partiality to the home-town team; in fact, some announcers have candidly stated in their broadcasts that they were biased. Thus, in many cases, there is a question whether or to what degree the public is being misled. On the other hand, as set forth above, arrangements under which the sports organization or program sponsor chooses, pays or exercises a veto power over the choice of announcers could result in substantial abdication by the licensee of control over his programming, subordination by the licensee of the public to his private interests in programming, deliberate distortion or suppression of news, or failure of the licensee to comply with the requirements of Section 317 (b) or (c) of the Communications Act. Therefore, we are here seeking information on all above-described and similar or related practices, and comments as to what the Commission's policies should be with respect thereto.

5. Specifically, the Commission seeks comment and information on the following matters:

(a) The extent to which announcers covering sports events are chosen and/or paid by parties other than the station licensee or network, or whose choice by the network or licensee is subject to the veto of any other party;

(b) The extent to which such announcers are regular salaried employees or officials of the organizations whose sports events they broadcast;

(c) The extent to which, under the circumstances set forth in (a) and (b) above, disclosure is broadcast of the relationship of the announcer to the sports promoter;

(d) The extent to which leagues, ball clubs, other sports promoters, colleges, college organizations or other parties other than licensees or networks have exercised control over the content of the broadcasts of their athletic events; e.g., requiring the announcers to promote attendance, praise the team, its players or the organization represented by the team, or to criticize other parties; preventing announcers from giving accurate weather reports or forecasts, commenting on poor attendance, criticizing the play of the team, its players or referees, umpires or other officials;

(e) The extent to which networks and licensees have complied with the requirements of Section 317 (b) and (c) of the Communications Act under circumstances set forth in (a), (b) or (d) above, and the

extent to which Section 508 of the Act has been violated in connection with sports broadcasts;[1]

(f) The extent to which networks or licensees have relinquished control over their sports programming to others, or have subordinated the public interest to their private interest by entering into agreements which tend to transfer control of such programming to other parties or which permit such practices as those cited in (d) above;

(g) The extent to which networks or stations may have engaged in, or permitted others to engage in, deliberate distortion or suppression of news in sportscasts;

(h) Whether, for the purposes of the Commission's regulatory policies, play-by-play broadcasts or sports events should be considered as broadcasts of news. [See *Letter to ABC et al.* (Democratic National Convention) 16 FCC 2d 650 (1969), *Hunger in America* 20 FCC 2d 143 (1969), *Letter to Mrs. J. R. Paul* 26 FCC 2d 591 (1969)];

(i) Whether, regardless of the possible validity of claims that sports events are not "news" within the meaning of previous Commission rulings on staging or deliberate distortion of news, the public interest is served by the practices set forth in (a) and (b) above and the possible consequences of such practices set forth in (d), (e), (f) and (g);

(j) In the light of the facts and allegations set forth above, what policy or policies, if any, the Commission should adopt with respect to the matters set forth herein.

6. The Commission invites the comments of all interested parties and particularly networks and licensees engaged in sports broadcasting, professional sports leagues and clubs, unions representing professional athletes, colleges and collegiate and other amateur sports organizations which deal with stations or networks regarding broadcasts of sports events, and sports announcers. Those filing comments may also provide any additional pertinent information they believe will be useful to the Commission.

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[1] Section 317(b) of the Act provides: In any case where a report has been made to a radio station, as required by section 508 of this Act, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

Section 317(c) provides: The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

Section 508 (a), (b) and (c) provide: (a) Subject to subsection (d), any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

(b) Subject to subsection (d), any person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast.

(c) Subject to subsection (d), any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast disclose to such other person any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.

7. This action is taken pursuant to Section 403 of the Communications Act of 1934, as amended. Interested parties may file comments on or before July 30, 1973. An original and eleven copies of each formal response must be filed in accordance with the provisions of Sections 1.49 and 1.51 of the Commission's Rules. However, in an effort to obtain the widest possible response in the proceeding from licensees and members of the public, informal comments without extra copies will be accepted. Copies of all pleadings filed in this matter will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

SEPARATE CONCURRING STATEMENT OF COMMISSIONER CHARLOTTE T. REID

On June 13, 1973, the Commission embarked upon an inquiry into the practices of networks and licensees in broadcasting sports events.

While I concurred in the action of the majority, I did so reluctantly, for I fear a long drawn out proceeding—much like that of the Network Study which has been going since the early 1950's.

In my judgment, we would have accomplished the desired result, that is, that the public interest is being served, by the issuance of a Public Notice calling attention of these alleged practices to the networks and licensees and reminding them of their responsibilities in these areas.

My experience has led me to believe that conscientious broadcasters will do that which is in the public interest and I believe that a public notice would have obtained this result.

F.C.C. 73R–236

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JOHN P. FREW AND JULIA N. FREW, D.B.A. 3 J's BROADCASTING CO., ATHENS, TENN. For Construction Permit	Docket No. 17618 File No. BPH–5768

APPEARANCES

Samuel Miller, on behalf of 3 J's Broadcasting Company; *Lawrence J. Bernard, Jr.*, on behalf of Athens Broadcasting Company, Inc.; and *Gerald M. Zuckerman* and *James W. Himes*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted June 18, 1973; Released June 26, 1973)

BY THE REVIEW BOARD: BERKEMYER, NELSON, AND KESSLER.

1. This proceeding originally involved the mutually exclusive applications of Athens Broadcasting Company, Inc. (Athens Broadcasting) and John P. Frew and Julia N. Frew, d/b as 3 J's Broadcasting Company (3 J's), for authority to construct a new FM broadcast station on Channel 252A in Athens, Tennessee. The applications were designated for hearing in 1967 [1] on an air hazard issue against 3 J's and the standard comparative issue.[2] The history of the proceeding after designation for hearing is long and detailed and need not be repeated here.[3] Suffice it to say that following several hearing sessions and the issuance of three Initial Decisions [4] and one Review Board Decision,[5] the Board, by Memorandum Opinion and Order, *supra* note 3, remanded the proceeding for a fourth hearing on issues against both applicants. A hearing session was held on February 20, 1973, and by Order, FCC 73M–322, released March 9, 1973, Administrative Law

[1] Order of the Chief of the Broadcast Bureau, acting under delegated authority, 32 FR 11712, published August 12, 1967.

[2] A site suitability issue against 3 J's was later added by the Review Board, by Memorandum Opinion and Order, 11 FCC 2d 559, 12 RR 2d 285, released February 5, 1968.

[3] A resume of the history of this proceeding may be found at paragraphs 2–4 of our Memorandum Opinion and Order, 37 FCC 2d 374, 375–377, 25 RR 2d 483, 485–487, released September 28, 1972.

[4] Initial Decision of Administrative Law Judge Thomas H. Donahue, 17 FCC 2d 458, 13 RR 2d 1217, released August 23, 1968; Cumulative Initial Decision of Judge Donahue, FCC 70D–32, released July 29, 1970; and Supplemental Initial Decision of Administrative Law Judge Ernest Nash, FCC 71D–32, released June 10, 1971. Judge Nash was assigned to preside over this proceeding upon the retirement of Judge Donahue. The two Initial Decisions of Judge Donahue recommended grant of Athens Broadcasting's application. In the Supplemental Initial Decision, Judge Nash determined that the evidence adduced at the third hearing did not affect the basic or comparative qualifications of Athens Broadcasting.

[5] 17 FCC 2d 452, 16 RR 2d 638, released May 2, 1969. The Board's Decision granted the application of 3 J's.

Judge Ernest Nash closed the record; dismissed, without prejudice and at the applicant's request, the application of Athens Broadcasting; retained the application of 3 J's in hearing status; and, without issuing an Initial Decision on the remand issue concerning 3 J's, returned the proceeding to the Board for disposition.

2. The only issue which remains to be resolved is "whether, in light of the evidence adduced at the second hearing in this proceeding concerning the past broadcast record of John P. Frew and Julia N. Frew, d/b as 3 J's Broadcasting Company, the applicant may reasonably be expected to exercise diligently that degree of licensee responsibility required by the operator of a broadcast facility and whether the public interest would be served by permitting the applicant to acquire an additional broadcast authorization." 3 J's is the licensee of standard broadcast Station WYXI, Athens, Tennessee, and the second hearing in this proceeding was ordered by the Commission for the express purpose of inquiring into the past broadcast record of 3 J's and its principals under the standard comparative issue. Memorandum Opinion and Order, 21 FCC 2d 161, 18 RR 2d 231, released January 26, 1970. Following the second hearing, Judge Donahue issued a Cumulative Initial Decision (see note 4, *supra*), in which he found several flaws in 3 J's' record and concluded, in effect, that 3 J's' past broadcast record was "unusually poor" because the applicant-licensee had deviated substantially from "the norm of sound licenseeship". For this and other reasons, the Judge recommended a grant of the application of Athens Broadcasting.[6] In our Memorandum Opinion and Order, *supra*, released September 28, 1972, we stated that "the evidence . . . adduced in this proceeding raises serious questions as to whether 3 J's should be entrusted with a second broadcast facility in Athens, Tennessee." We therefore added the above-quoted issue but emphasized that "the past broadcast record of 3 J's is not to be retried" because "the existing record is sufficient . . . upon which to base conclusions on the issue being added." The parties were afforded the opportunity of offering new evidence relating to 3 J's' past broadcast record, but at the hearing held on February 20, 1973, only 3 J's offered such evidence, namely, an exhibit consisting of daily program logs for recent composite weeks. The exhibit was rejected by the Presiding Judge. Thus, there is no *further* evidence in the record pertaining to the remand issue. Aside from the rejected exhibit, 3 J's had full opportunity to adduce evidence, but chose not to do so. Instead, 3 J's relies entirely on the hearing record made in 1970.

3. On April 3, 1973, a panel of the Review Board heard oral argument on the sole remaining issue. 3 J's urged that its application should be granted. The Broadcast Bureau took the position that "the Board would be justified . . . in finding that 3 J's should not be entrusted at this time with another broadcast facility." We have reviewed the

[6] Oral argument on exceptions to the Cumulative Initial Decision, and to the Supplemental Initial Decision of Judge Nash, *supra*, was held before a panel of the Review Board on April 18, 1972. On September 28, 1972, the proceeding was remanded to the Administrative Law Judge for further hearing. See paragraph 1, *supra*. Therefore, the exceptions are still pending before the Board. In view of the dismissal of Athens Broadcasting's application, the exceptions to the Supplemental Initial Decision are moot.

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Cumulative Initial Decision in light of the exceptions and supporting briefs, the arguments of the parties, and our examination of the record. Judge Donahue's findings of fact are, for the most part, accurate and adequate, and, except as modified herein and in the rulings on exceptions contained in the attached Appendix, those findings are adopted. To the extent that the Judge's conclusions deal with 3 J's' past broadcast record, we have considered them and agree with many of them. There are some conclusions, however, with which we disagree, as will be explained in this Decision. Since the Presiding Judge did not have an opportunity in his Cumulative Initial Decision to pass on the question of whether the public interest would be served by permitting 3 J's to acquire an additional broadcast authorization, we have carefully reviewed the entire record *de novo* to resolve this question. Basically, we agree with Judge Donahue that the record shows several flaws in 3 J's' record and that, as a broadcast licensee, 3 J's has deviated substantially "from the norm of sound licenseeship". In our view, 3 J's' record is so deficient that we cannot conclude that the public interest would be served by permitting 3 J's to acquire an additional broadcast authorization in Athens at this time.

4. In his Cumulative Initial Decision, the Presiding Judge concluded that John Frew, 3 J's' co-owner: (1) induced the addition of a false jurat to a letter which was submitted to the Commission in violation of a United States criminal statute; (2) disseminated a misleading survey in connection with his standard broadcast station in Athens; (3) violated the Communications Act of 1934, as amended, and the Commission's Rules and Regulations by failing to reveal the correct sponsor (*i.e.*, the Dodson Insurance Agency) of broadcast material; (4) engaged in at least three reporting failures in regard to the transfer of his interests in a number of broadcast stations; (5) failed to keep accurate logs for his Athens station in violation of the Commission's Rules; (6) advertised a lottery on his station in violation of law; and (7) failed to carry out many of the programming commitments on his Athens station. While we disagree with some of these conclusions, the record as a whole indicates that John Frew's record as a broadcaster is unusually poor and that, from the outset, 3 J's' operation of Station WYXI has been characterized by numerous acts of misfeasance and nonfeasance, clearly indicating that 3 J's cannot be "prospectively expected to exercise that degree of responsibility required of a licensee." *DuPage County Broadcasting, Inc.*, 39 FCC 2d 885, 886, 26 RR 2d 1242, 1244 (1973). It is well settled that "before a grant [of a broadcast license] may be found to be in the public interest, the Commission is entitled to have some reasonable assurance that the applicant will diligently exercise that degree of licensee responsibility expected of the operator of a broadcast facility, and past conduct of an applicant in the operation of a station must be accorded substantial weight." *DuPage County Broadcasting, Inc.*, 21 FCC 2d 395, 398, 18 RR 2d 321, 325, reconsideration granted in part and denied in part 23 FCC 2d 22, 19 RR 2d 568 (1970). Frew's and 3 J's' "past conduct", as reflected in the hearing record, does not reasonably assure us that, as an FM station operator, 3 J's will diligently exercise the degree of licensee responsibility

expected of the operator of a broadcast facility. Three incidents, considered together, convince us that 3 J's' application must be denied. They are: (1) the false jurat; (2) the reporting failures; and (3) the numerous logging errors. In addition, there are other aspects of 3 J's' record, which, while not mandating a denial, nevertheless indicate a pattern of poor licensee practices which buttresses our conclusion to deny 3 J's' application.

5. *The False Jurat.* In our opinion, the most serious blot on 3 J's' record is Frew's knowing submission in 1969 of a false jurat to the Commission. The facts are not disputed. On June 17, 1969, 3 J's filed an opposition to Athens Broadcasting's application for review of the Board's May, 1969 Decision (see note 5, *supra*). Attached to the pleading was a letter, dated June 10, 1969, signed by Wallace Varnell, an Athens merchant, and addressed to Frew. After Varnell had signed the letter and without his knowledge, Frew added a jurat (*i.e.*, "sworn to and subscribed before me this 10th day of June, 1969") and had it signed by one J. E. Gene Johnson, a notary. Johnson was not apprised of the circumstances of the jurat. Frew testified that he had the jurat and Johnson's signature added to the letter because he understood that it was required by the Commission. The Presiding Judge concluded that Frew's conduct violated 18 USC § 1001, which provides for a $10,000 fine, five years in prison, or both, for one who "knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, or make or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry". 3 J's admits all of the facts and concedes that Frew violated the law, but argues that, "at best, 3 J's should suffer but the slightest demerit on this matter." We disagree. While it appears that Frew may have had no actual motive to engage in falsification (*i.e.*, Varnell testified that the letter *was* "true and correct"), the matter is a serious one involving a willful misrepresentation to the Commission.[7] Frew intended the Commission to believe that he was submitting a sworn statement, when in fact he was not *and* he knew he was not. Frew's actions were entirely voluntary and clearly display a cavalier disregard for the law which reflects adversely on him and 3 J's.[8] The Commission simply cannot tolerate attempts by those who come before it to willingly deceive it, albeit with seemingly "useless deceptions". *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 227 (1946).

As an administrative agency entrusted by Congress to establish an efficient, nation-wide communications system and to grant authorizations thereunder consistent with the public interest, convenience and necessity, the Commission must, of necessity, rely upon the statements and submission of its licensees in discharging its statutory responsibilities. The fundamental importance of truthfulness and complete candor on the part of applicants, as well as licensees, in their dealings with the Commission is well established.[9]

[7] Even though the applicant confesses that Frew violated the law, we are not in a position to decide whether Frew is guilty of a criminal law violation.

[8] *Jane A. Roberts* (*KCFI*), 29 FCC 141, 18 RR 905 (1960), mistakenly cited by 3 J's in its brief in support of exceptions, in no way supports a contrary conclusion. The innocent character of the applicant's actions in that case, stemming from a lack of understanding of statutory requirements, clearly differentiates it from the instant situation.

[9] *Lebanon Valley Radio, Inc.*, 35 FCC 2d 243, 258, 24 RR 2d 586, 604 (1972), review denied FCC 73–226, released March 2, 1973. [Citations omitted.]

Frew's willingness to deceive the Commission does not augur well for the operation of a new FM station.

6. *The Reporting Failures.* Next, the record clearly shows that Frew is responsible for at least three failures to report transfers of his interests in broadcast facilities. While these failures occurred before Frew began operation of Station WYXI, they are indisputably part of his record before the Commission, [10] and, together with the false jurat and numerous logging errors, indicate what can be expected of 3 J's in the future in meeting its responsibilities to the public and the Commission.[11] Again, the facts themselves are undisputed. Frew and one Leslie E. Gradick each owned 50% of the stock of Georgia Radio, Inc. (Georgia Radio), which began operation of Station WPLK, Rockmart, Georgia, during August of 1959, with Frew as general manager. In February, 1961, Frew left WPLK because of personal differences with Gradick, and Gradick became primarily responsible for operation of the station. Frew filed a civil suit against Georgia Radio and Gradick, which was settled pursuant to an understanding reached during July, 1961. Pursuant to the settlement, four agreements were entered into transferring the interests of Frew in WPLK and three partnerships which had been granted authorizations to construct new standard broadcast stations in Thomaston, Americus and Rome, Georgia (Stations WTGA, WISK and WIYN, respectively)[12] to corporations in which Frew had no interest. The agreements were not filed with the Commission until the applications for transfer of control and/or assignment of permit were filed in December, 1961 (WPLK and WTGA); January, 1962 (WISK); and June, 1962 (WIYN). Although all four agreements disposing of Frew's interests were entered into at approximately the same time, the Commission's files indicate that the agreements in the WPLK and WTGA applications were dated July 21, 1961, the agreement in the WISK application was dated December 29, 1961, and the agreement in the WIYN application was dated May 28, 1962. On the WISK contract, the year "1961" had obviously been changed to "1962" before filing with the Commission. The Presiding Judge concluded, on the basis of the above facts, that, while Frew was responsible for reporting his withdrawal from the various partnerships in which he and his parents held stock, "the facts do not support a conclusion that he was involved in some shady conspiracy to hoodwink the Commission."

7. While the Board agrees that the record does not support a finding that Frew participated in a conspiracy to withhold information from the Commission, he cannot escape responsibility for failures to report the ownership changes to the Commission, the significance of which should not be overly minimized. Arguably, of greatest seriousness was

[10] *Cf. East St. Louis Broadcasting, Inc.*, 9 FCC 2d 212, 10 RR 2d 859 (1967).

[11] The fact that the record indicates no further reporting violations by Frew or WYXI does not, as 3 J's implicitly argues, diminish the impact of the three reporting failures acknowledged by 3 J's. Together with the other facts in the record, they demonstrate a pattern of poor practices and must be held against 3 J's.

[12] The partnerships were respectively: John P. Frew, Elizabeth H. Frew, Stephen B. McGarrity and Leslie E. Gradick, Jr., d/b/a Radio Georgia; John Frew, R. E. Lashley, L. E. Gradick and R. E. Lashley, Jr., d/b/a Sumter Broadcasting Co.; and John Frew, Leslie B. Gradick, Jr. and Floyd W. Frew, d/b/a Radio Rome. Frew was to be the general manager of the Americus station. Elizabeth and Floyd Frew are John Frew's parents.

the failure to report Frew's severance from WPLK, an operating station of which Frew was a 50% owner and general manager. Frew ceased to be general manager when he left the station in February, 1961, and formally gave up his interest in the facility through one of the July, 1961 agreements, yet the Commission was not informed until December 5, 1961. Hardly less serious, in the cases of WISK and WIYN, the Commission was permitted to make grants (on September 7, 1961, and May 12, 1962, respectively) in ignorance of the fact that Frew and other partners had previously assigned their interests in applicant partnerships to Gradick. Finally, after WTGA's application was granted in May, 1961, Frew and his mother (55% owners) and Stephen McGarrity transferred their interests to Gradick, a fact which was first brought to the Commission's attention approximately five months after the July, 1961, agreements and nine or ten months after Frew severed contact with Gradick and WPLK. Moreover, the significance of these derelictions is magnified by the possible falsification of the dates on the agreements filed with the applications for transfer of control or assignment of permit filed in December, 1961, January, 1962 and June, 1962. Frew offered no explanation in his testimony as to why the Commission was not immediately informed of his parting with Gradick or of the July, 1961, agreements. As a principal in all four entities, Frew cannot be exonerated from blame by the fact that in many instances he bowed to Gradick's expertise in Commission matters. In sum, Frew's failure to assure that Commission Rules were complied with, or to even consult those rules, reflects adversely on his record as a broadcaster.[13]

8. *Logging Errors and Violations.* Under Frew's supervision, Station WYXI has been guilty of numerous and repeated failures of log-keeping, and, therefore, of a pattern of failures to provide the information required by Section 73.112 of the Commission's Rules.[14] An analysis of the 27 days covered by WYXI's program logs for the 1967, 1968 and 1969 composite weeks designated by the Commission and a special composite week specified for the WYXI 1967 renewal application, reveals, in brief, the following failures: (a) failure to log the requisite station identification on 29 occasions during the 27 days in question; (b) failure on 27 occasions (11 when Frew was on duty) during the period to indicate either the existence or amount of commercial continuity within sponsored programs, thus making it impossible from the logs alone to compile the amount of program time and

[13] However, we would not go further and conclude, as suggested by Athens Broadcasting in its exceptions, that a *de facto* transfer of Frew's interests in WPLK took place without Commission approval in violation of Section 310 of the Communications Act. *Cf. Coral Television Corp.* (*WCIX–TV*), 29 FCC 2d 266, 21 RR 2d 1114 (1971). There is no question that formal transfer of Frew's interest in the station did not take place until Commission approval on December 5, 1961; the transfer agreement was made subject to such approval. Moreover, there is considerable evidence in the record that, although Frew left WPLK, he did not relinquish his negative control. In fact, one of the allegations in his suit against Georgia Radio and Gradick was that, before anyone else could assume his duties as general manager, he, as director of the corporation, "would have to be approached upon the subject and to-date has not been so approached and thereby alleges that there is no such general manager. . . ." Gradick also refers, in his March 16, 1962, answer to a Commission letter to WTGA dated March 8, 1962, to Frew's retention of his negative control even though Frew had taken employment elsewhere.

[14] Complete findings of fact as to WYXI's failures can be found in paragraphs 23 through 37 of the Cumulative Initial Decision and it would serve no useful purpose to repeat these findings.

commercial content necessary to confirm the figures contained in the station's 1967 and 1970 renewal applications; (c) misclassified and/or inconsistently classified programs; (d) failure of the maker of log corrections to initial them on 60 occasions, ten when Frew was on duty; (e) failure on 25 occasions (nine with Frew on duty) to signify that appropriate programs had been identified as sponsored; and (f) failure to give the duration or identity of public service announcements on 40 occasions. Frew, as owner of WYXI, must be held responsible for the clear pattern of logging failures. *Cf. Continental Broadcasting, Inc.*, 15 FCC 2d 120, 14 RR 2d 813 (1968), reconsideration denied 17 FCC 2d 485, 16 RR 2d 30 (1969), affirmed 142 U.S. App. D.C. 70, 439 F.2d 580, 20 RR 2d 2126, cert. denied 403 U.S. 905 (1971). Further, Frew's position as general manager of the station and his testimony that he hires, fires and trains employees, instructs them in logging and spot-checks the logs, compounds his responsibility for such failures. Moreover, Frew's testimony and explanations on this matter lead us to the conclusion that such failures stem mainly from carelessness rather than understandable confusion,[15] and the Commission has held that a licensee's carelessness and/or inadvertence do not exonerate logging failures. See, *e.g.*, *WAME Broadcasting Co.*, 10 FCC 2d 635, 11 RR 2d 762 (1967).

9. In its brief, 3 J's acknowledges Frew's record of poor log-keeping, but contends that the Administrative Law Judge gave "too much weight" to the matter [16] since cases of sloppy log-keeping have never been held to constitute "substantial" debits in comparative broadcast proceedings, and here there is no suggestion of an intent to deceive the Commission or falsify the logs. At the April 3, 1973, oral argument, 3 J's again conceded that its log-keeping practices have been "sloppy", but insisted that "this alone is [not] sufficient to warrant disqualification, nor does this combined with the other [matters warrant] disqualification." In the Board's view, the sloppy log-keeping practices at WYXI constitute a further reason for denying 3 J's' application. It is established Commission policy that errors of logging can reflect adversely on an applicant's past broadcast record [17] and Commission precedent does not indicate that intent to deceive is a predicate for

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[15] For instance, Frew testified that although it is his present understanding that a correction must be lined through with a single line and then initialed, it was his understanding in the past that the signature of the announcer at the bottom of the log page was sufficient. However, he was shown indications of two occasions in the course of one week in which corrections *were* initialed, once by Frew himself. Frew could provide no coherent explanation for the two instances of initialing.

[16] The Judge made the following conclusions on the logging errors:

The facts . . . show a pattern of sloppy log keeping practices on the part of Frew at his station WYXI that extends from failure to initial corrections to failure to identify sponsorship or to log so as to make clear that commercial material broadcast was actually commercial in nature. These failings violate a number of Commission rules and reporting form requirements. Because they do, they constitute a substantial entry on the debit side of Frew's licensee qualifications ledger. [Paragraph 1(e) of the Conclusions.]

[17] *Cf. Madison County Broadcasters*, 30 FCC 694, 21 RR 615 (1961). 3 J's cites this case in its brief for its contention that the weight given the logging errors by the Presiding Judge was inconsistent with Commission policy. However, *Madison County* stands for the proposition that logging failures constitute a serious matter and, while in the special factual context of that case, the applicant in question was still preferred over its opponent, the logging failures were held to have reduced its advantage based upon its "superior past record" to only a "slight" preference. 30 FCC at 699, 21 RR at 621.

the assessment of such a debit.[18] In any case, it is unnecessary to precisely define the weight to be given to 3 J's' logging failures *standing alone*. In view of our conclusions concerning the *entire* operation of WYXI, the poor log-keeping must be regarded as one among several elements in Frew's poor broadcast record. Accordingly, it shall be weighed against 3 J's.

10. *Other Matters: Broadcast of a Lottery.* In our opinion, the foregoing matters, considered together, warrant denial of 3 J's' application. In addition, there are other incidents in 3 J's' past broadcast record which provide further reasons for doubting whether 3 J's "may reasonably be expected to exercise diligently that degree of licensee responsibility required by the operator of a broadcast facility". Neither of these latter incidents, either standing alone or considered together, would necessarily lead us to conclude that 3 J's' application should be denied; however, when the *entire* past broadcast record of 3 J's and its principals is examined,[19] the conclusion is inescapable that the application must be denied. The two additional matters bearing upon 3 J's' past broadcast record are: the broadcast by WYXI of a merchants' promotion; and an editorial concerning the promotion. The promotion involved a $1,000 cash giveaway organized in February, 1969, by the Merchants Committee of the Athens Chamber of Commerce in order to stimulate local business. The contest operated through the distribution of tickets to customers of the local merchants. WYXI, two other broadcast stations in the area (Stations WCPH, Etowah, Tennessee, and WENR, Englewood, Tennessee), and the local daily newspaper participated in the promotion by carrying advertising and news stories concerning it. However, Station WLAR, Athens, licensed to Athens Broadcasting, refused to participate because it earnestly believed the contest to be a lottery, a position which was confirmed by its Washington attorney. The Presiding Judge, concluded that the promotion was, "in some instances at least", a lottery, and, therefore, that 3 J's was "guilty . . . of engaging in an inadmissible broadcast practice." On balance, we do not agree that the promotion was a lottery. However, we are troubled by an editorial broadcast by WYXI in connection with the promotion. We will first discuss the promotion and then the editorial.

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[18] 3 J's citation of *Community Broadcasting Service, Inc.*, 2 FCC 2d 53, 6 RR 2d 589 (1965), is untenable. In that case, the Board was dealing with a standard *comparative* issue whereas in the instant case we are resolving a broad disqualifying issue which was framed, in part, to inquire into 3 J's logging practices. Additionally, the factual situation before us relates to more aggravated and comprehensive logging irregularities. Finally, both *Veterans Broadcasting Co., Inc.*, 38 FCC 25, 4 RR 2d 375 (1965); and *Florida Gulfcoast Broadcasters, Inc.*, 32 FCC 197, 23 RR 1 (1962), cited in footnote 39 of the *Community* case, can be distinguished. In *Veterans*, the Commission found that the alleged logging irregularities were either understandable, not contrary to Commission rules or insignificant in view of similar failures on the part of the competitors in the proceeding. 32 FCC at 206, 23 RR at 12–13. In *Florida Gulfcoast*, the Commission was not faced with a pattern of logging errors continuing over a period of time, as is the case here, but with logging violations all of which took place on a single broadcast day and most of which occurred during a single program. In addition, in *Veterans* there was evidence that the applicant had taken, over the years, special steps to avoid logging violations, a situation also not presented by the instant record. 38 FCC at 53, 4 RR 2d at 409–410.

[19] In this connection, we note that, while the Dodson Insurance Agency promotion does not, as the Presiding Judge held, involve violations of either the Communications Act or the Commission's Rules, the contest was run in a manner which does not reflect well on Frew, WYXI or 3 J's. See our ruling on 3 J's Exception No. 22 in the attached Appendix.

11. The necessary elements of a lottery are: "(1) the awarding of a prize; (2) upon a contingency determined by chance; (3) to a person who has paid or agreed to pay a valuable consideration for the chance to win the prize." Public Notice *Concerning Applicability of Lottery Statute to Contests and Sales Promotions*, 18 FCC 2d 52, 16 RR 2d 1559 (1969). There is no question that the first two elements were present in the promotion under consideration. However, we are also of the opinion that the record supports a conclusion that the element of consideration was lacking from the giveaway, as conceived. Wallace Varnell, Chairman of the Merchants Committee at the time of the promotion, testified that it was contemplated that anyone could obtain an unlimited number of free tickets from any participating merchant without making a purchase and that he endeavored to make this clear to his fellow merchants at the planning meetings. The fact that some participants at the meeting complained about the unlimited availability of tickets does not detract from the basic soundness of the contest scheme. Billboards, signs, and broadcast advertisements referred to "free" tickets. Some doubts are raised by the statement in the material distributed to participating merchants that the "Method of giving tickets will be one ticket per $1 sale." However, Varnell's explanation that this was "bad wording" on his part and that the one ticket for $1 of merchandise formula had as its sole object a method of determining how many tickets would be needed is not improbable, and, significantly, the statement is followed by the following instructions: "Purchase not necessary. Tickets are Free for the asking." Therefore, it would seem that the promotion *as conceived*, and as understood by Frew through conversations with Varnell, Frew's attendance at the planning meetings at which the rules for the promotion were discussed, and the announcements which Frew received from advertisers for broadcast, provided for the availability of free chances "on a basis which is reasonably equal to that on which contestants who purchase . . . may obtain them." Public Notice, *supra*, 18 FCC 2d at 52, 16 RR 2d at 1560.

12. However, the key questions here are: (a) whether, once the contest actually began, there were repeated failures by retailers to provide unlimited free chances; (b) whether Frew was put on notice that he might have been aiding what was, in fact, a lottery; and (c) if he was put on notice, whether he demonstrated the proper diligence in discerning the truth of the matter. The testimony of William Atkins then a principal of Athens Broadcasting, concerning visits made by himself and his agents to participating stores which allegedly linked the distribution of tickets to purchases and an advertisement placed in the local newspaper by a merchant which announced "This coupon worth 25 extra FREE TICKETS—with the purchase of any Ladies Dress Shoes", indicate that at least six stores out of the approximately 36 participating merchants were in one way or another linking the distribution of tickets to purchases. However, as 3 J's urges in its exceptions, Atkins himself only visited one store which was violating the contest rules and his testimony concerning what his agents allegedly saw and were allegedly told and subsequently conveyed to him is hearsay. Atkins' agents did not testify in this proceeding nor

did they supply affidavits. Their alleged experiences are conveyed solely through Atkins' testimony, and since some of that testimony involves conversations *twice removed*, it is, in part, double hearsay. McCormick, *Evidence* § 225 (1954).

13. Nevertheless, we do not agree with the position, taken by 3 J's in its exceptions, that the testimony in question should not have been admitted by the Presiding Judge. An Administrative Law Judge has broad authority over the conduct of the hearing and his rulings on the admissibility of evidence cannot be overruled absent a clear abuse of discretion. *Cf. Chapman Radio and Television Co.*, 6 FCC 2d 768, 9 RR 2d 595 (1967). There has been no such abuse here. Furthermore, hearsay evidence may be received and considered in federal administrative proceedings. Davis, *Administrative Law*, pages 274–275 (1965). However, in the specific circumstances of this case, Atkins' testimony concerning the investigations by his employees, while admissible, is entitled to very little weight. Therefore, the *first hand* evidence concerning the way the promotion was operated in practice by participating merchants is too fragmentary to conclude that the contest was actually operated as a lottery in more than a few isolated instances. The Commission's Public Notice on lotteries, *supra*, states that "a few isolated instances of unavailability of free chances will not result in a finding that the scheme involves a lottery". 18 FCC 2d at 53, 16 RR 2d at 1560. However, even were we to conclude that the promotion *was* in practice operated as a lottery, we could not further conclude that Frew should have been put on guard and taken greater precautions to avoid creating an illegal contest. It is true that Frew was aware almost from the beginning that WLAR believed the contest to be a lottery and had declined to participate. Nevertheless, on balance, the Board believes that, while it would have been wise to further investigate the reasons for WLAR's position (which certainly was not in WLAR's commercial interests and could not have been taken lightly), Frew should not be taxed with a lack of reasonable diligence in the face of the information he had obtained about the promotion from meetings, talks with Varnell, participation in the preparation of materials, some personal visits to participating stores, and exposure to the wording of ads, plus the fact that the daily newspaper and stations other than WLAR participated in the promotion. In sum, we conclude: (a) that the Athens merchants' promotion was not a lottery as conceived; (b) that the record does not provide sufficient support for a conclusion that the contest was operated as a lottery in more than a few isolated instances; and (c) that, even if we assume that it *was* so operated, the record does not present a picture of irresponsibility or lack of reasonable diligence sufficient to warrant the assessment of any *substantial* debit to Frew's past broadcast record. However, the foregoing facts clearly do not reflect a high degree of diligence and caution on the part of this licensee.

14. *WYXI's Editorial Concerning the Promotion.* Athens Broadcasting argues that the Presiding Judge overlooked a serious aspect of WYXI's involvement in the merchants' promotion. That is, on or about March 12, 1969, WYXI broadcast an editorial every hour throughout the broadcast day (or approximately thirteen times) in support of the

merchants' promotion and attacking "certain factions" which opposed it.[20] Frew admitted on the record that the phrase "certain factions" referred to WLAR. The record further shows that there was no mention whatsoever of the editorial in WYXI's logs. Interestingly, the program was logged as "Sports", Frew explaining that the editorial was so logged because it was carried at the time ordinarily devoted to sports. WLAR was not contacted regarding the editorial, either before or after it was broadcast. Athens Broadcasting argues that WYXI did not encourage the presentation of contrasting views to its editorial and therefore violated the Fairness Doctrine.

15. In our opinion, the foregoing facts—none of which is disputed by 3 J's—buttress our conclusion to deny 3 J's' application for a second radio station in Athens. We do not necessarily agree with Athens Broadcasting's contention that there was a violation of the Commission's Fairness Doctrine. Nevertheless, sufficient questions have been raised by WYXI's conduct to cause concern for any future broadcast operation by 3 J's. The editorial involved a matter (*i.e.*, the Athens merchants promotion) in which the licensee was personally *and* financially involved, thereby increasing its responsibilities for fairness. See *Springfield Television Broadcasting Company*, 4 RR 2d 681 (1965); *Midwest Television, Inc.*, 40 FCC 475 (1958). Frew testified that WYXI carried the editorial because "the promotion was beneficial for the merchants of Athens, and the merchants are necessarily my lifeblood and I hate for someone to take an opposite stand on something". The fact that Frew "hates" opposing points of view, does not, however, excuse the use of his publicly licensed broadcast facility to air personal grievances with a competing radio station. "Broadcast stations are licensed to serve the public interest rather than the private interest of the licensee". *Gross Telecasting, Inc.*, 14 FCC 2d 239, 13 RR 2d 1067, 1068 (1968). Therefore, "radio stations should not be used for the private interest, whims, or caprices of the particular persons who have been granted licenses, but in [a] manner which will serve the community generally and the various groups which make up the community." *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1248 (1949). The undisputed facts suggest that 3 J's may not have acted reasonably and in good faith in broadcasting the editorial in question. In view of Frew's own testimony, it is doubtful whether the editorial was calculated to serve the right of the public to be informed on a controversial issue. Rather, it seems that the editorial was

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[20] The editorial was as follows:

Announcer: "[We would like to] congratulate the Athens Chamber of Commerce on their $1,000 merchants promotion. WYXI feels that merchant promotions such as this stimulate business and good will for the progressive City of Athens. This reporter has learned that certain factions within this city have taken the back road to do nothing, stay [sic] small attitudes and have spread the word that the $1,000 give-away could be called a lottery. This is complete garbage. Our Athens' merchants are not involved in a lottery and for anyone to even suggest so, has to be placed in a class of very small people. I will assume that those within this City that realize that good sound promotions, such as the $1,000 give-away are here to stay. Believe me, they are here to stay. They have been examined by this State's foremost lawyers and have been accepted as completely legal. WYXI management endorses fresh ideas to create more actively within our City and we invite those that feel the need to bad-mouth, either keep their big mouth shut or move to another area where gossip is more important than progress. For WYXI, this is Bill Dickey.

Second Announcer: "Due to the unusually strong favorable response to the preceding editorial, WYXI management has decided to repeat Bill Dickey's comments every hour throughout the day. We invite your comments to either myself or Bill Dickey. This is John Frew."

designed to promote the private and personal interests of 3 J's. This cannot be tolerated by the Commission because:

> Only insofar as it [licensee editorialization] is exercised in conformity with the paramount right of the public to hear a reasonably balanced presentation of all responsible viewpoints on particular issues can such editorialization be considered to be consistent with the licensee's duty to operate in the public interest. *Report on Editorializing, supra* at 1258.

16. *Summation.* To summarize, we conclude that 3 J's' operation of Station WYXI has been marked by the following deviations from the norms and duties of responsible operation which must be required of every Commission licensee: (1) the acknowledged filing of a false jurat with the Commission; (2) the failure to timely report Frew's withdrawal from broadcast applicants and operations; and (3) numerous logging errors and omissions. In addition, WYXI did not exercise a high degree of diligence when it broadcast the Athens Merchants Promotion and did not act consistently with its responsibilities as a Commission licensee in connection with the editorial broadcast on the promotion. The Review Board believes that no matter what degree of seriousness might attach to any of the above matters, standing alone, taken together they lead to the conclusions that 3 J's deviated substantially from "the norm of sound licenseeship", and that 3 J's' broadcast record as a whole has been "unusually poor". In short, the record simply does not contain sufficient evidence to demonstrate that 3 J's can be expected to operate its proposed FM station in a manner consistent with the public interest. One of the purposes of the remand proceeding was to make a prospective determination of whether 3 J's can be expected to operate its proposed station responsibly. In this regard, we are of the opinion that critical weight must be given to the facts that the submission of the false jurat was "the result of an intentional disregard for our regulations",[21] and that the other incidents were the result of ineptness and carelessness, indicating that 3 J's' owners are prone to mistakes.[22] We do not presume to determine the effect of this record on 3 J's' qualifications to continue the operation of its existing standard broadcast station;[23] however, we are convinced that 3 J's' operation of WYXI should not be rewarded with another station in the same community at this time. Compare *DuPage County Broadcasting, Inc., supra*, 39 FCC 2d 885, 26 RR 2d 1242. Therefore, 3 J's' application for a new FM station at Athens, Tennessee, will be denied.

17. Accordingly, IT IS ORDERED, That the application of John P. Frew and Julia N. Frew, d/b as 3 J's Broadcasting Company (BPH–5768), for a construction permit for a new FM broadcast station on Channel 252A in Athens, Tennessee, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
JOSEPH N. NELSON, *Member, Review Board.*

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[21] *DuPage County Broadcasting, Inc., supra*, 39 FCC 2d at 893, 26 RR 2d at 1251.

[22] We take official notice of the fact that, unlike the situation in the *DuPage* case, *supra*, 39 FCC 2d at 893, 26 RR 2d at 1251, the 1970 license renewal application of Station WYXI has not yet been granted, but is still pending before the Commission in view of the questions raised in this proceeding.

[23] "Whether [3 J's] misconduct . . . is of sufficient gravity to warrant the revocation or denial of renewal of [WYXI's] license is not the critical issue. . . . We are not now concerned with the renewal or revocation of [WYXI's] station license, but with the question of whether [3 J's] . . . should be entrusted with a second broadcast facility." *DuPage County Broadcasting, Inc., supra*, 21 FCC 2d at 397–98, 18 RR 2d at 324–25.

APPENDIX

RULINGS ON EXCEPTIONS TO THE CUMULATIVE INITIAL DECISION

EXCEPTIONS OF 3 J'S BROADCASTING COMPANY TO FINDINGS OF FACT

Exception No.	*Ruling*
1, 16, 18	Denied as being of no decisional significance.
2	Granted to the extent that the record shows that John P. Frew supplied facts to the magazine about the survey, but had nothing to do with the writing of the magazine article and did not see it before it was published, and that there is no indication that Frew had the same staff in 1968 as he did in 1970; denied in all other respects because it is not clear from the record that the number of people in the service area was an estimate by the magazine.
3	Denied. The Presiding Judge's finding is supported by the record. (Tr. 513; Athens Broadcasting Ex. R–20.)
4	Denied. The Judge's finding is accurate and adequately supported by the record. (Tr. 454–455.) See also paragraph 11 of this Decision.
5	Granted. See paragraph 11 of this Decision.
6	Granted. The record does not support the Judge's finding that "Atkins visited the stores of participating merchants. . . ." Atkins visited only one store. (Tr. 469, 470.)
7	Granted. The requested findings are supported by the record. See Tr. 34.
8	Denied. See paragraphs 12 and 13 of this Decision.
9	Granted to the extent that the record establishes that the "teasers" were part of regular advertising on Station WYXI (Tr. 527); denied to the extent that there is no evidence in the record to support the same finding in regard to other media that participated in the promotion.
10	Granted. The requested finding is supported by the record. See D. Tr. 26.
11	Denied. The Judge's finding is supported by the record. See D. Tr. 21.
12	Denied. The Judge's finding is relevant and material.
13	Granted to the extent that programs other than "Lifeline" could be characterized as public affairs programs; denied to the extent that the Earl Nightingale program does not appear from the record to be properly characterized as a public affairs program (Tr. 503) and it is not clear from the record that the figure in the 1970 renewal application for the amount of public affairs programming broadcast in the preceding license period was accurate.
14	Denied. It is clear from the Initial Decision that the Presiding Judge understood that the programs in question were proposed only in the 1964 application. There is no implication that these programs were proposed in subsequent renewal applications.
15	Denied. The Judge's finding is accurate. There is no indication in WYXI's 1967 renewal application that Frew proposed to carry local public affairs programs only "as the need arose."
17	Granted. According to the record, Frew admits only that there was a variance between the promises made in 1964 and the performance during the initial period of operation. Paragraph 66 of the Cumulative Initial Decision is accordingly modified to reflect this fact.

Exception No.	*Ruling*
19	Granted to the extent that Frew has received no notices of violation since WYXI has been on the air (Tr. 547), and that the Commission granted WYXI's 1967 renewal application; denied in all other respects as being of no decisional significance.

EXCEPTION OF 3 J'S BROADCASTING COMPANY TO CONCLUSIONS OF LAW

20	Denied. See paragraph 5 of this Decision.
21	Granted. The Board essentially agrees with 3 J's on the matter of the audience measurement survey. Accordingly, we have not held this against 3 J's.
22	Granted in substance. 3 J's did not violate either Section 317 of the Communications Act or Section 73.119(c) of the Rules in connection with the Dodson Insurance Agency promotion. The statute requires the announcement of the name of the person paying for the program or promotion. In this case, the J.C.L. Company paid for the promotion and it was so announced and logged by WYXI. Nevertheless, the running of the contest, as accurately summarized in paragraphs 13–15 of the Judge's findings, does reflect adversely on 3 J's because the contest appears to have been misleading. The chances of anyone winning were infinitesimal; WYXI made very sure that the name of the insurance company, which had always paid for its advertising on WYXI in the past, was never mentioned, so listeners received no real clues to the nature of the so-called contest or to the correct answer. In the past, the Commission has condemned similar contests. See, *e.g.*, *Eastern Broadcasting Corp.*, 14 FCC 2d 228, 14 RR 2d 331 (1968); *WCHS–AM–TV Corp.*, 8 FCC 2d 608, 10 RR 2d 445 (1967). Again, while the foregoing does not, standing alone, warrant denial of 3 J's' application, it does not speak well for a future FM operation by 3 J's.
23	Denied. See paragraphs 8 and 9 of this Decision.
24	Granted in substance. See paragraphs 10–13 of this Decision.
25	Granted in substance. The Board essentially agrees with 3 J's on the matter of promise versus performance. In light of the Commission's grant of WYXI's 1967 renewal application, no adverse conclusions are being made by us with respect to the discrepancies in promise versus performance.
26	Denied. Insofar as the Judge's conclusions are relevant to the remand issue, they are supported by the record and are adopted by us. The conclusions on the comparative issue are now moot.
27	Dismissed as moot in view of the dismissal of Athens Broadcasting's application.
28	Denied for the reasons stated in the whole of this Decision.

EXCEPTIONS OF ATHENS BROADCASTING COMPANY, INC., TO FINDINGS OF FACT

1	Denied as being of no decisional significance.
2	Denied. See paragraphs 14 and 15 of this Decision.

EXCEPTIONS TO CONCLUSIONS

3	Denied. The record does not show that 3 J's' actions were "deliberate and designed to deceive listeners". But see our ruling on 3 J's Exception No. 22.

Exception No.	*Ruling*
4	Denied. The announcements in question were part of the regular advertising of the merchants involved. Therefore, the sponsorship of the announcements was at all times clear and there was no violation of Section 317 of the Communications Act or Commission Rule 73.119(c). (Tr. 527.)
5	Granted in substance. See our ruling on 3 J's Exception No. 22.
6	Denied. See footnote 13 of this Decision.
7	Denied. See paragraph 15 of this Decision.
8	Denied. There is no basis for concluding that WYXI's conduct constituted an "unfair trade practice". See paragraph 13 of this Decision.
9	Denied. As 3 J's points out in its "Supplement to Findings of Athens Broadcasting Company", filed July 9, 1970, under Section 73.71 of the Rules, a daytime-only station need be on the air only for two-thirds of its license time from 6:00 a.m. to 6:00 p.m. This would not settle the question if the record demonstrated that 3 J's, in not using all of its allotted time, was failing to meet community needs. However, there is no such evidence—no sign of unmet needs or community protest. Therefore, the matter cannot be held to reflect adversely on 3 J's' past broadcast record.
10	Dismissed as moot in view of the dismissal of the Athens Broadcasting application.

F.C.C. 70D-32

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ATHENS BROADCASTING CO., INC., ATHENS, TENN. JOHN P. FREW AND JULIA N. FREW D.B.A. 3 J's BROADCASTING CO., ATHENS, TENN. For Construction Permits	Docket No. 17617 File No. BPH-5668 Docket No. 17618 File No. BPH-5768

APPEARANCES

Lawrence J. Bernard, Jr. and *James J. Freeman*, on behalf of Athens Broadcasting Company, Inc.; *Samuel Miller, Joseph Chachkin* and *Stephen A. Gold*, on behalf of 3 J's Broadcasting Company; and *Gerald M. Zuckerman*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

CUMULATIVE INITIAL DECISION OF HEARING EXAMINER THOMAS H. DONAHUE

(Issued July 23, 1970; Released July 29, 1970)

EXPLANATORY NOTE

1. As will be pointed out at greater length below, this case involves a remand to the Examiner for further proceedings. The Examiner retires from government service at the end of the current month. At the close of the record of the remand proceeding there was a considerable discussion over whether an Initial Decision by this Examiner could be issued before his retirement. In view of the protracted nature of the proceeding, applicants and the Examiner were desirous that such a decision should be issued. After some deliberation and review of his then current workload, the Examiner agreed that he could get out an Initial Decision before retirement if proposed findings were filed by the applicants in such form that large segments of their contents could be adopted. Counsel cooperated, something for which they have the sincere thanks of the Examiner.

2. Since the remand issue is broad, in the main the Examiner has sought to lean on the side of liberality toward the applicants in adopting their findings. However, it perhaps should be noted that he has always felt that his role in these proceedings carried with it a responsibility to weed out, at the initial stage of the decisional process, matter patently not germane to rational final determination. Some of the material here rejected should be especially mentioned. Athens spent considerable time at hearing, and in its proposed findings it devotes

considerable space, to the development of facts having to do with Frew's use of telephone company lines in connection with a remote broadcast. These facts, however, dwindle to a footnote in proposed conclusions, where a claim is limply made, that the incident indicates a predilection on Frew's part to ignore the rights of others. The Examiner does not believe the facts concerning the incident even rise to that low level of materiality. Accordingly, the subject has been omitted from the decision. Similarly, Athens makes findings but abandons the matter in conclusions, over the fact that Frew, in order to avoid personnel problems, uniformly signs his daytime station off the air at 6:30 p.m., whereas he could, under the terms of license, operate the station from 45 minutes to two hours and a half longer during the months March through October. Facts on that subject too have been here excised. These two examples of the Examiner's refusal to adopt proposed findings will suffice for explanation. Other similar but less unwieldy excisions have been made.

PRELIMINARY STATEMENT

3. This proceeding involves the mutually exclusive applications of Athens Broadcasting Company, Inc. and John P. Frew and Julia N. Frew, d/b as 3 J's Broadcasting Company, each seeking authority to construct and operate an FM broadcast station in Athens, Tennessee. The applications were designated for hearing by order released August 9, 1967. The issues designated concerned: (1) the hazard the 3 J's proposal might cause to air navigation; and (2) a comparison of the two applicants. The Review Board subsequently added a site suitability issue as to 3 J's. Hearing conferences were held on October 17, November 28 and December 4, 1967, January 8 and March 21, 1968; hearing sessions were held on January 12, January 24 and April 19, 1968. The record was closed by Examiner's order released April 26, 1968. Both applicants and the Broadcast Bureau filed proposed findings in early June of 1968.

4. On August 23, 1968, the Examiner released an Initial Decision. Although finding favorably for 3 J's on the air hazard and site suitability issues, grant to Athens was recommended. In reaching decision the Examiner held that the preferences awarded to Athens for proposing a more efficient utilization of the frequency, due to greater coverage and proposed auxiliary power system, outweighed the preference awarded to 3 J's, for proposing to integrate 100% of its ownership into the management of its FM station on a full-time basis. The Examiner noted: "There is an element of conjecture in the assumption that integration of ownership into station operation begets sensitivity to changing area needs that is not present in the solid grounds for preference won by Athens Broadcasting." 13 RR 2d 1217, 1225, 17 F.C.C. 2d 468, 474.

5. Exceptions to the Examiner's decision were filed with the Review Board by 3 J's, and Athens filed a "Statement . . . in Support of Initial Decision and Exceptions to Portions Thereof." Oral argument was held before a panel of the Review Board on February 11, 1969, and on May 2, 1969, the Board released a decision reversing the Examiner

and recommending that 3 J's application be granted. The Board's decision was based upon its determination that 3 J's merited a "slight preference in the diversification of control of the media of mass communications and a substantial preference in the category of integration of ownership with management." These preferences, the Board held, outweighed the preferences awarded Athens for its proposal to serve greater areas and populations and to broadcast more unduplicated programming. 17 F.C.C. 2d 452, 464, 16 RR 2d 638, 653.

6. On June 2, 1969, Athens filed with the Commission an application for review, requesting that the Review Board's decision be reversed and its own application granted, or, in the alternative, that the case be remanded to the Examiner for a further hearing on the past broadcast record of 3 J's. On January 26, 1970, the Commission issued a Memorandum Opinion and Order in which it said:

> "The allegations of Athens Broadcasting in this proceeding raise serious questions concerning Frew's withdrawals from prior broadcast interests, performance of representations made in the 3 J's AM application, and possible violation of our Rules." 21 F.C.C. 2d 161, 162, 18 RR 2d 231, 233.

The Commission ordered that the record be reopened for the reception of further evidence on the matters alleged by Athens and that a "Cumulative Initial Decision covering all aspects of this proceeding" should be issued by the Examiner.

7. Discovery procedures were initiated by Athens, and, pursuant thereto, various documents were made available by 3 J's to Athens' counsel and oral depositions were taken in Athens, Tennessee, on April 17, 1970. Subsequently, hearing sessions were held on May 25, 26 and June 3, 1970. The record was closed on the latter date.

FINDINGS OF FACT

Past Broadcast Record of 3 J's Broadcasting Company

The Varnell "Affidavit"

8. On June 17, 1969, 3 J's filed with the Commission an "Opposition to Application for Review" in this proceeding. Attached to that pleading was a copy of a letter addressed to Mr. John Frew from Wallace Varnell, Chairman of the Retail Merchants Division of the Athens Chamber of Commerce. Underneath Varnell's signature on the letter, the words "Sworn to and subscribed before me this 10th day of June 1969" and the signature of J. E. Gene Johnson, "C.C.C." appeared. At the time Varnell prepared and mailed the letter of June 10, 1969 to Frew the quoted language was not typed on the letter. Further, Varnell had no knowledge that the language was later added to the letter or that the letter was signed by Johnson. Frew testified that although he was familiar with the Commission's requirements that material submitted with a pleading be sworn to, he did not ask Varnell to swear to the letter at the time it was written, nor did he ever inform Varnell that a jurat was added to the letter before it was submitted to the Commission. Moreover, Johnson was not informed that the language had been inserted after Varnell had sent the letter to Frew and that the jurat was being appended without Varnell's knowledge. Frew had the jurat appended because "he understood it was

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necessary" under FCC procedures. Varnell did testify that the letter was "true and correct" as filed with the Commission. Frew also testified that since the county in which the incident took place was small, the county clerk would know Varnell's signature.

Audience Measurement Surveys

9. During April of 1968 Frew requested the McMinn Rescue Squad Crewettes to make a survey of the radio audience in the Athens area. The Crewettes are wives of the members of the McMinn County Rescue Squad. A number of questions were prepared and the Crewettes were asked to make the survey employing telephone calls to persons selected at random from the Athens telephone book. This book includes the towns of Athens, Riceville, Decatur and Etowah. Each of these towns has a different telephone exchange. The Crewettes were instructed to make a majorty of their calls in Athens since the biggest portion of the population in the area resided there. The survey sheets provided by WYXI contained questions to be asked and space for answers. When the Crewettes had completed the survey, the survey sheets were returned to the station and tabulated. WYXI prepared a report from the tabulation and circulated it to some of the station's advertisers and potential advertisers. The report indicated that 41% of the people in Athens, 58% of the people in Riceville, and 47% of the people in Decatur listen to WYXI, while, in each instance, lesser percentages listened to "Athens Radio Station 'B'" and other similarly described stations. In Etowah, the report indicated that the "Etowah station" had 34% of the listeners and WYXI was in second place with 24%.

10. WYXI purchased advertising from a magazine, *Southern Broadcast*, which is circulated without charge to radio stations, various advertising agencies, and other media and time buyers throughout North and South Carolina, Tennessee, Georgia, Alabama, and Florida. As a part of the advertising purchase, the magazine agreed to write an article about the station. This article was published in the August 1968 issue and indicated that population in the WYXI .5 mv service area was estimated at 63,000. The article further mentioned the McMinn Rescue Squad survey and quoted the listener percentages noted above. The article further stated that a "two-man news department keeps local listeners informed . . ." (Dep. Ex. 5, p. 2). An engineering exhibit received into evidence in this proceeding on January 12, 1968, found the population within WYXI's 0.5 mv/m contour to be 43,033. Frew testified that WYXI has a staff of 4 announcers and a secretary. Only one of the announcers is employed full time.

11. During December of 1966 Frew hired Mrs. Kathleen Baker of the McMinn Telephone Answering Service to conduct a listener survey of Athens and the surrounding area. In her survey Mrs. Baker selected telephone numbers and names at random from the Athens telephone book and asked:

"Were you listening to your Radio when the phone rang?"
"What station and program are you listening to?"

If she received an answer that the radio was not turned on, she asked: "to what station do you usually listen?" and "what is your favorite Station and Program?". In a report circulated to advertisers by WYXI Mrs. Baker certified that WYXI was the most listened to station in the area with 38% of the audience, that WLAR had 33% of the audience, and that WCPH (Etowah, Tennessee) had 29% of the audience (Dep. Ex. 5).

12. Frew did not instruct Mrs. Baker or the Crewettes as to the number of calls to make in connection with the two listener surveys. Between three and four months after the survey by Mrs. Baker had been made showing WYXI to be the number 1 station, the station changed program formats from "top 40" music to "country and western" music. Frew testified that he changed program formats because a new station was coming into the market.

The Dodson Insurance Agency Promotion

13. During July and August of 1967 WYXI carried a promotion and "contest" which was paid for by James C. Liner. Frew described the Dodson Insurance Agency as "another one of his [Liner's] companies." A sequence in the promotion-contest as described in the record ran as follows:

> Announcer: "It's time now for another special prize phone call on WYXI and your chance to win money. This phone call is worth [stated amount of money]. We are making this phone call at random from the latest Athens phone book. We are calling all numbers in McMinn County. Now let's make that call."

At this point, the announcer was instructed to dial the number and broadcast the dial tone from the telephone until a party answered. Upon receiving an answer, the announcer was to state over the air:

> "Hello, is this [name of person, place of residence and telephone number from the telephone book]? This is [name of announcer] at WYXI for [amount of money]."

After assuring himself that he had the right party, the announcer then asked "what does the year 1899 mean to you?" After completing the question, the announcer was instructed not to give the answer over the air; the answer was printed below as "the year that Dodson Insurance Agency was founded." The instructions to the announcer indicate that "After you have asked the question and get no answer say 'wait just a moment and when we get off the air I'll give you the answer'" (Dep. Ex. 4). At the end of each phone call the announcer was instructed to state "very quickly . . . 'This contest is sponsored by J.C.L. Company.'" The instructions concluded with the following three warnings to the announcer which were outlined in pencil and preceded by the penciled word "NOTE!":

> Do not say Dodson Insurance Agency on the air . . .
> Do not give this away on the air . . .
> Do not mention Dodson on the air . . .

The announcements were entered on WYXI's program logs as being sponsored by the J.C.L. Company. Liner also owns the J.C.L. Company.

14. Mr. Liner, who runs the Dodson Insurance Agency, has purchased advertising to promote the agency over WYXI on a number

of occasions. The other advertising for the agency that he purchased was logged as sponsored by Dodson Insurance Agency.

15. An exhibit in this proceeding relating to the Dodson promotional contest is entitled: "Record of Prize Money and Winners". There are penciled entries of the amount of prize money awarded running from $10.00 to $49.00, together with several dates upon which calls were apparently made. There is, however, no evidence in the record who, if anyone, gave a correct answer.

Mr. Frew's Association with Station WPLK, Rockmart, Georgia, and Permits for Stations at Rome, Thomaston, and Americus, Georgia

16. Mr. John Frew, the controlling partner of 3 J's, had the following broadcast ownership interests prior to obtaining WYXI in Athens:

(1) *WTGA, Thomaston, Georgia*

On May 6, 1959 an application for authority to construct a new standard broadcast station at Thomaston, Georgia, was filed by John P. Frew, Elizabeth H. Frew, Stephen B. McGarrity, and Leslie E. Gradick, Jr., doing business as Radio Georgia (File No. BP–13051). The application indicated that John P. Frew and his mother, Elizabeth H. Frew, held a combined 55 percent interest in the applicant. The application was granted on May 4, 1961, after a hearing in Docket 13600. On December 5, 1961, an application (File No. BAP–546), requesting an assignment of the permit to a corporation in which John P. Frew and his mother held no interest, was filed. That application was granted without hearing and without question.

(2) *WISK, Americus, Georgia*

On October 28, 1959, John P. Frew, R. E. Lashley, L. E. Gradick and R. E. Lashley, Jr., a partnership doing business as Sumter Broadcasting Co., filed an application for authority to construct a new standard broadcast station at Americus, Georgia (File No. BP–13628). The application indicated that Frew was to be the proposed station's general manager. The Commission granted the application on September 7, 1961, and on January 30, 1962, an application (File No. BAP–569) was filed, requesting the assignment of the construction permit to a corporation in which Frew had no interest. The application was granted without hearing.

(3) *WIYN, Rome, Georgia*

On April 12, 1960, John P. Frew, Leslie E. Gradick, Jr. and Floyd W. Frew (John Frew's father), a partnership doing business as Radio Rome, filed an application for authority to construct a new standard broadcast station at Rome, Georgia, and the application was granted on May 12, 1962. On June 8, 1962, an application (File No. BAP–595) for assignment of the permit to a corporation in which Mr. Frew had no interest was filed. The application for assignment was granted and the station received program test authority and commenced operation on August 1, 1962.

(4) *WPLK, Rockmart, Georgia*

John P. Frew and Leslie E. Gradick each owned 50% of the stock of Georgia Radio, Inc., which constructed and began operation of Station WPLK in Rockmart, Georgia, during August of 1959. Mr. Frew was general manager of WPLK from the time it began operations until February of 1961. On December 5, 1961, Mr. Frew filed an application with the Commission requesting permission to assign his 50% interest in Georgia Radio, Inc. to Leslie E. Gradick. The latter application was granted "very quickly."

17. Frew and Gradick were the principal parties in the preparation and planning of the applications discussed above; other persons mentioned were basically investors.

18. Sometime in February of 1961, Frew left WPLK because of personal problems "and arguments" with Gradick. Shortly afterwards he filed a suit against Georgia Radio, Inc. and L. E. Gradick. The complaint as sworn to and filed by Frew in the Superior Court of Polk County, Georgia, stated that:

"[Frew] does not know and has not been communicated with by said defendant L. E. Gradick, Jr., or the defendant corporation in any form whatever since said date of February 2, 1961, and does not at the present time know whether said resignation was ever accepted or rejected or whether anyone is presently discharging the duties of managing the radio station as the general manager of said defendant corporation. Said plaintiff does allege that before anyone could assume such duties that as a director of said corporation said plaintiff would have to be approached upon the subject and to date has not been so approached, and thereby alleges that there is no such general manager and that said defendant corporation and said radio station are presently without a general manager to discharge the duties thereof and manage said radio station, and that there has been no legal meeting of the directors or stockholders thereof." (Tr. 584–585)

19. The suit was settled pursuant to an understanding of the parties reached in July of 1961. Under the settlement understanding, four agreements were entered into by Frew and others. These agreements called for the assignment of his interests in Georgia Radio, Inc. (WPLK), Radio Georgia (WTGA), Radio Rome (WIYN), and Sumter Broadcasting Company (WISK). The agreements, however, were not filed with the Commission until the applications for transfer of control and/or assignment of permit described above were filed during December of 1961 (WPLK and WTGA); January of 1962 (WISK); and June of 1962 (WIYN). Although the agreements disposing of Frew's interest in the four Commission authorizations were entered into at approximately the same time and were part of the same overall settlement of the suit filed in February 1961, the Commission's files indicate that the agreements in the WPLK and WTGA applications were dated July 21, 1961, the agreement in the WISK application was dated December 29, 1961 and the agreement in the WIYN application was dated May 28, 1962. In the contract filed with the WISK application, the year "1961" had obviously been changed to "1962" before filing with the Commission.

20. Frew testified that when he left WPLK in February of 1961, his relations with Mr. Gradick were not only strained but beyond repair. However, Frew did not offer explanation as to why the Commission was not immediately informed that he had relinquished negative control of the licensee of WPLK and that working partnerships which controlled one Commission construction permit (WTGA) and two pending applications (WISK and WIYN) had been in fact, if not law, dissolved. Similarly, Frew did not offer explanation as to why the Commission was not immediately notified of the July 1961 agreements transferring his interest in a licensee, a permittee and two applicants. He indicated that the agreements were handled under less than pleasant conditions. Frew also testified that a Mr. Grubbs represented him as an attorney in some of the negotiations but that at some point during settlement negotiations, Grubbs stopped representing him and he (Frew) determined that he could represent his own interests. Although Frew referred to Gradick's experience on FCC matters because

of the latter's experience, he indicated that he did not let Mr. Gradick represent him or his interests "in any fashion" during this period because relations between the two were still strained. Frew stated that he did not seek another attorney's advice after dismissing Grubbs, nor did he check into the Commission's rules and regulations concerning the requirements to notify the Commission of changes in applicants or licensees.

21. In a letter to WTGA dated March 8, 1962, the Commission stated that "material attached to your assignment application indicates that an assignment was contemplated as early as August of 1961, four months before such application had been filed," and requested an explanation of (1) "the apparent substantial lapse in time between your initial intention to assign and the actual filing of an assignment application" and (2) "the reasons for and circumstances surrounding the filing of the application" (Athens Ex. R–18). In answer to the Commission's inquiry, Mr. Gradick submitted a letter dated March 16, 1962, in which he stated as follows:

"Although no particular reason is to be ascribed to the discord which developed between Mr. Gradick and Mr. Frew, it became apparent during the summer of 1961 that a continuation of the business partnership insofar as stations WPLK and WTGA are concerned was not possible. Mr. Frew who had been active in the operation of WPLK took employment elsewhere, and although he continued to exercise his position of negative control, Mr. Gradick was primarily responsible for the operation of the station." (Athens Ex. R–18)

22. On November 6, 1962, the Commission addressed a letter to John P. Frew, Leslie E. Gradick, Jr., and Floyd Frew, a partnership doing business as Radio Rome. The Commission's letter concerned the application for assignment of construction permit for Station WIYN, Rome, Georgia (File No. BAP–595) and inquired concerning the control of Station WIYN from the date it began operations through November of 1962. In answer to this letter Gradick submitted to the Commission on January 18, 1963, a letter which stated *inter alia* as follows:

"At the time the application for construction permit was filed, John Frew and I were working partners in station WPLK, Rockmart, Georgia. Subsequently, and primarily due to a deep clash of personalities, Mr. Frew abandoned the station to me.

* * * * * * *

"The WIYN application for construction permit had been pending since February 1960 in the name of a partnership composed of Leslie E. Gradick, John Frew and his father, Floyd Frew, each owning one-third interest when the partnership dissolution took place. To have amended the application to reflect the parting of the ways would have resulted in a new application, as the Commission's Rule governing amendments was interpreted, which would have meant many more months of delay. Further, it had been contemplated by the partnership that I was to be primarily responsible for the prosecution of the application and would construct the station and direct the operation of the station. In other words, I was to be the working partner.

* * * * * * *

"Although I now recognize that there may have been a technical change in control, it was believed that, as a practical matter, there was no such change." (Athens Ex. R–17)

Errors in WYXI Program Logs

23. Athens Broadcasting Company, Inc. Exhibit R–20 is an analysis of certain program logs for Station WYXI covering the period from the station's commencement of operation through 1969. In each year the designated composite week logs were analyzed, together with a special composite week specified by the Commission for the 1967 WYXI renewal. The analysis consists of a narrative summary and a day-by-day breakdown of the logs indicating what public affairs and "other" (except religious) programming was carried by WYXI and identifying errors and inconsistencies in the logs. Except as noted in the following paragraph, the accuracy of this exhibit is not challenged.

24. The log analysis lists three repeated "errors" on WYXI's logs which were subsequently clarified by Mr. Frew's testimony. These are: failure to specify an end time for the program "Sports Shorts"; failure to specify an end time for the program "Song of Faith"; and failure to make any log entries for the program "Pick Hit". Mr. Frew testified that "Song of Faith" was a religious song played every hour at approximately quarter past the hour and was not a program as such. Similarly, "Pick Hit" refers to a record picked at random which the station believes could be a possible hit record in the future and is not itself a program. Frew also stated that he did not consider "Sports Shorts" a program as such, although it is logged as a news program. Mr. Frew stated that he did not include "Sports Shorts" in computing his news percentages.

25. Frew testified that he is active in the day-to-day management of WYXI and hires, fires and trains new employees. He also has an up-to-date copy of Part 73 of the FCC Rules. He further stated that all of the employees of WYXI who are involved in logging have third class operators' permits and have passed a test on the FCC's Rules and Regulations. In addition, he instructs them on correctly filling out the logs and spot checks and corrects the logs where necessary. Although he does not check the program log every day, "most days I check it". Mr. Frew also testified that when he discovers a mistake, he informs the announcer so that the same error will not be made in the future.

26. An analysis prepared by Athens indicates that during the 27 days covered by the logs the required station identifications were not made or, at least not logged on 29 occasions, and 7 such omissions occurred during periods when Frew was on duty. Frew testified that the absence of a station ID entry on the logs did not indicate that there was no station identification. He stated: "I have been in radio since age 17 and I know the regulation that you must have a station identification every half hour" (Tr. 682). Frew further testified that he listens to WYXI when he is not on duty and he does not recall any instances in which the station identification was not made as required.

27. The Appendix to Athens Ex. R–20 indicates that on 60 occasions corrections were made on the logs which were not initialed by the person making them. Ten of these occurred during periods when Mr. Frew

was on duty. The majority of these corrections were hand written additions or substitutions to the pre-typed material. Others were corrections made to hand written log entries. The parties stipulated that a majority of the corrections involved commercial announcements but that on 15 occasions corrections to program entries were not initialed.

28. According to Frew, WYXI uses pre-printed logs with last minute additions and corrections made by hand. Mr. Frew also testified that all such changes are made before the log is signed at the bottom and that he "thought that the name where the announcer signed it was sufficient" (Tr. 687). The sample logs attached to Athens Ex. R–20 contain three pages which were not signed by the announcer on duty. When shown page 2 of the log attached to Athens Ex. R–20, Frew acknowledged that a correction had been initialed by him and "[t]hat would indicate that I made the correction or that I lined it through" (Tr. 696). Although shown a second instance of an initialed correction, Frew nevertheless maintained that it had been his understanding that initialing was unnecessary if the log sheet was signed. As to these two initialed changes, Frew stated, "I don't remember why they were initialed in this particular instance. . . ." (Tr. 698). His *present* understanding, however, is that a correction "must be lined through with a single line so that what has been lined through may be read and it must be initialed" (Tr. 687).

29. The logs submitted with an exhibit, Athens Exhibit R–20, indicate that WYXI used a checkmark to signify that a program had been announced as sponsored. The log analysis submitted by Athens indicates than on 25 occasions this checkmark was omitted where the program entries indicated that a sponsorship identification should have been made. Nine of these instances occurred when Frew was on duty. Among the programs not announced as sponsored was one entitled "Periscope" which was furnished free of charge by *Newsweek* Magazine. In this program the editor of *Newsweek* interviewed one of his departmental editors regarding a subject which has been covered in *Newsweek* Magazine and which is of current interest to the public. This program is distributed by Sam Chase Associates. The station also carried "American Profile" which is a 5-minute program put out by the Radio and Television Committee of the Presbyterian Church. In this program people engaged in various kinds of charitable work are interviewed. The program is church-oriented. It is, however, not religious in content. Frew testified that it is not the station's practice to announce who provides programs such as "American Profile" and "Periscope". Frew also stated that the "Periscope" program did. in fact, indicate that it came from *Newsweek* but not from Sam Chase Associates. Further, the logs do not show which organizations provided the tapes.

30. WYXI carries at least eleven regularly scheduled commercial religious programs, but the logs uniformly fail to indicate that these programs are commercial or have been announced as such. Frew testified that the station's policy is to announce over the air that these programs are paid for and to indicate their commercial nature in the logs by inserting the letter "C". However, Frew later testified that "the only commercial copy in a religious program would be the intro and

the close of the program, and that is not indicated on our logs" (Tr. 513). He added that the station announced the commercial nature of the program but did not indicate it on the logs. This is confirmed by the logs attached to Athens Ex. R–20 which contain a program "Old Time Religion" which was paid for, but the log gives no indication that the program was commercial or that it was announced as sponsored.

31. Other programs where sponsorship announcements were not logged are "Lifeline" and "The Earl Nightingale Show". "Lifeline" is a program WYXI purchases which contains commercial continuity for the HLH Company. It was described as a "patriotic program" discussing issues of the day including some controversial issues. The Earl Nightingale Show, called "Our Changing World", is a talk program on the "philosophy on life".

32. Frew testified that prior to examining the regulations with his counsel he had been unaware of the procedure in regard to announcing sponsorship of programs such as "Periscope". After such examination he stated that he understood that a program of 5 minutes or less required one announcement indicating the source of the program and by whom it was furnished; longer programs require announcements at their beginning and end; the name of the party furnishing the program should be listed on the log as well as the length of the announcement, which itself should be classified as commercial continuity. Frew also testified that to the best of his knowledge there are no separate requirements for sponsorship identification where the programs involved discuss controversial issues.

33. Athens' log analysis also shows that on 29 occasions during the 27-day period surveyed the logs failed to indicate either the existence or the amount of commercial continuity within programs which were sponsored. On 11 of these occasions Frew was on duty. The amount of commercial time was most frequently omitted in the Nightingale Show, "Lifeline", Pin Point Weather, and the news. The commercial spot duration was not logged on at least one occasion for "Jubilee". None of the commercial religious programming had the commercial continuity broken down in the logs.

34. Because of the failure to log accurately commercial content, it was impossible to compute from the logs themselves the amount of program time and commercial content to confirm the figures contained in the station's 1967 and 1970 renewals. For example, page 1 of the log for Sunday, January 28, 1968, indicates that WYXI carried a program called "Jubilee". During this program the station ran 8 sponsored commercials but failed to record the amount of commercial time for any of these commercials. Frew testified that although the duration of the commercials was not indicated, he would have estimated them as 60-second spots since the station broadcasts no spots longer than 60 seconds and that as to other programs computed into the percentages contained in the applications, he would subtract commercial time from his own personal knowledge without relying on the logs. In explaining how he would compute the percentages required by the renewal forms, Frew stated that the Nightingale Show was a five minute segment, the last 30 seconds of which was a spot announce-

ment. The other four and one-half minutes contained 90 seconds of commercial continuity so the program time was three minutes. Earlier, however, Frew testified that this five-minute program contained one minute and 20 seconds of commercial continuity and the tape furnished the station, without commercials, ran 3 minutes and 40 seconds. This results in a 40-second discrepancy in the amount of program time as to this one program.

35. The Athens log analysis exhibit also shows that the duration or identity of public service announcements was omitted on 40 occasions. Three of these omissions occurred when Frew was on duty.

36. Another error disclosed by Athens' analysis of WYXI logs was the misclassification and inconsistent classification of programs. The logs thus employed disclose that the Nightingale Show was classified variously as religious (15), public affairs (9), agricultural (1), news (1) and instructional (6). On five occasions the program type column was left blank. The "Lifeline" program was classified initially as religious and subsequently as public affairs. Similarly, the "American Profile" program was classified variously as instructional (1), religious (2), public affairs (3) and "L" (6). "Music and Farm News", a program carried on a daily basis during most of the period covered by the logs, was classified variously as entertainment, agricultural, or entertainment and agricultural, and on three occasions was not classified at all. The record also indicates that the editorial broadcast by WYXI concerning WLAR's refusal to participate in the merchants' promotion was logged as "Sports". The weather reports broadcast by the station were carried as agricultural programming in many instances while at other times they were not given any type classification. Frew testified that this program is a national, state and local summary of the weather along with a forecast.

37. Frew stated, "My intent, now that these errors have been brought to my attention, is to go back to the station and to thoroughly go through my logs, make on-the-spot corrections to all my employees that have anything to do with the logs, and then submit some sample logs to your [his counsel's] office for you to review" (Tr. 576).

WYXI's Broadcasts and Editorial Concerning the 1969 $1,000 Merchants' Promotion

38. In February of 1969, Wallace Varnell, Chairman of the Merchants Committee of the Athens Chamber of Commerce, telephoned William Atkins of Athens' station WLAR and explained that his committee was sponsoring a $1,000 cash giveway promotion to stimulate local business. In answer to a question from Atkins, Varnell indicated that each participating merchant would give their customers a "ticket" for each $1 worth of merchandise purchased, and that the "ticket" would then be turned in for a drawing, in which the winning tickets would receive $1,000. Atkins told Varnell that the contest appeared to be a lottery and that he would not be able to mention it over the air. Varnell then stated that one ticket would be given away to every person who entered the store, and an additional ticket would be given away for each $1 worth of merchandise purchased. Atkins said he felt the contest would be a lottery even if one ticket were given

away to everyone, and Varnell replied that they would discuss the question of a lottery later. Thereafter, a number of meetings were held between Varnell and participating merchants. At each of these meetings Varnell warned against utilizing the contest for a lottery. Atkins attended none of these meetings.

39. During the time the contest ran in Athens, WLAR was approached on a number of occasions by advertisers who wanted the promotion mentioned in their advertising. Atkins consulted his attorney concerning the contest as outlined by Varnell and was told that the contest would be a lottery if run in the manner described. Atkins visited the stores of participating merchants in Athens to find out how the contest worked. He asked clerks in one of the stores, Woolworth's, how the tickets were being given away. The clerk told him that with each $1 worth of merchandise purchased, a ticket would be received.

40. Atkins had other station personnel investigate the contest. They reported back that they had called on some of the participating stores. The Jenkins & Darwin Store required a $1 purchase for each ticket distributed. At least four merchants gave away one free ticket to each person entering their stores and then gave away additional tickets on the basis of one ticket for each $1 purchase. One of the staff reported that he had been in the Hub Furniture Company (managed by Varnell) when a person walked in, bought nothing, and received a ticket. Several minutes later another person walked in, made a purchase, received a free ticket plus a ticket for each $1 worth of merchandise purchased. The manager of Reynold's Clothing Store told Atkins that he gave away one ticket for each dollar's worth of merchandise purchased. It was also reported to Atkins that the White Store was giving away tickets on the basis of one ticket for each dollar's worth of merchandise purchased.

41. Of the 36 merchants participating in the contest ten were regular advertisers over Athens station WLAR. When participating merchants called that station and asked to have the promotion mentioned along with their regular advertising, they were told that the promotion could not be mentioned in a broadcast because WLAR believed it to be a lottery and the broadcast of lottery information was against the FCC's rules.

42. Three other broadcast stations in the area, including WYXI, and the local daily newspaper, participated in the promotion by carrying advertising covering it. Work on the contest began in early February 1969 when 5 pages of material were distributed to participating media. The first 4 pages of this material contained sample spot advertisements to be used during each of the 4 weeks of the contest. The first page contained "Teaser Spots", apparently to be run before the details of the contest were announced to the public. The promotion was not scheduled to begin until February 26, but the "Teaser" announcements were to be made during the weeks of February 17–25 as supplements to the merchants' regular advertising. The "Teaser Spots" were to be delivered after an introduction stating "Your Athens Chamber of Commerce asks:" and included the questions: "Could you use $1000?", "How many pennies in $1000?" and "Would you walk a mile for $1000?" (Dep. Ex. 2).

43. The material was prepared by Varnell and two other local merchants. The spots were broadcast by radio stations participating in the contest and by the daily paper. Few participated in the preparation of the material distributed to the media and WYXI broadcast spot announcements and other information regarding the contest.

44. The written material submitted to local merchants indicated that the "[m]ethod of giving tickets will be 1 ticket per $1.00 sale" (Dep. Ex. 3). Varnell testified that his organization had not intended to promote a lottery and that "[p]robably this is bad wording on my part" (D. Tr. 22). He explained that he had intended these words to describe a method by which merchants could calculate the number of tickets they would need for distribution to customers. He further stated that it was his intent that the tickets would be available in equal number to all regardless of whether or not a purchase was made. Varnell also stated that during the meetings concerning the promotion prior to the contest a number of merchants voiced complaints about the proposed method of distribution since the merchants were required to purchase the tickets and they were afraid some people would ask for a "whole roll" without making a purchase.

45. An employee of Station WLAR told Varnell that the station considered the promotion to be a lottery and Varnell respond that his committee could not control how other merchants distributed the tickets. Varnell testified that it was physically impossible for inspection to be made of each store for the purpose of policing the contest.

46. Varnell told Frew that WLAR was not participating in the promotion, but that all of the other media in the area were cooperating. WYXI prepared an editorial statement concerning the promotion and WLAR's refusal to participate in it. Frew discussed the editorial with Mr. Varnell before broadcasting it.

47. An exhibit introduced into evidence is a copy of an advertisement for Hines Shoe Store in Athens, Tennessee. The advertisement is taken from the March 12, 1969 issue of the local newspaper. The advertisement states that if a coupon attached to the advertisement were presented to the shoe store it would be worth 25 extra free tickets with the purchase of any ladies dress shoes. Numerous advertisements taken from the same paper during the promotion indicate that "free" tickets were available from particiapting merchants. Moreover, that free tickets were available was a message carried by many billboards and posters. However, none of the ads indicated that *unlimited* free tickets were available. The subject of how to distribute tickets was discussed on a number of occasions at meetings of the participating merchants held during the time of the promotion.

48. On or about March 12, 1969, WYXI broadcast the following editorial "every hour throughout the day" or approximately 13 times (Athens Ex. R–6):

> **Announcer: "[We would like to] congratulate the Athens Chamber of Commerce on their $1,000 merchants promotion. WYXI feels that merchant promotions such as this stimulate business and good will for the progressive City of Athens. This reporter has learned that certain factions within this city have taken the back road of do nothing, stay [sic] small attitudes and have spread the word that the $1,000 give-away could be called a lottery. This is complete garbage. Our Athens' merchants are not involved in a lottery and for anyone**

to even suggest so, has to be placed in a class of very small people. I will assume that those within this City that realize that good sound promotions, such as the $1,000 give-away are here to stay. Believe me, they are here to stay. They have been examined by this State's foremost lawyers and have been accepted as completely legal. WYXI management endorses fresh ideas to create more activity within our City and we invite those that feel the need to bad-mouth, either keep their big mouth shut or move to another area where gossip is more important than progress. For WYXI, this is Bill Dickey.

Second Announcer: "Due to the unusually strong favorable response to the preceding editorial, WYXI management has decided to repeat Bill Dickey's comments every hour throughout the day. We invite your comments to either myself or Bill Dickey. This is John Frew."

49. Frew admitted on the stand that the "certain factions" mentioned in the editorial were intended to refer to Station WLAR.

50. No mention of the editorial was made in WYXI's logs; the program was logged as "Sports". Frew explained that the editorial was logged "Sports" because it was carried in the time ordinarily devoted to sports. There was no "consultation" with a lawyer concerning the promotion. Frew testified that he had mentioned the editorial to a lawyer friend in casual conversation. He did not, however, seek or pay for a legal opinion concerning the promotion. WLAR was not contacted regarding the editorial either before or after it was broadcast. Frew explained that WYXI carried the editorial because "the promotion was beneficial for the merchants of Athens, and the merchants are necessarily my life-blood and I hate for someone to take an opposite stand on something" (Tr. 531).

51. Frew indicated that a number of merchants called WYXI and mentioned the editorial favorably to him on the day it was broadcast.

WYXI's Programming: Promise v. Performance

52. Section IV of 3 J's application for construction permit for WYXI (BP–16513, filed in December 1964) proposed the broadcast of 7.50% agriculture, 1.25% education, 1.87% discussion, and 1.56% talk programming. The program schedule attached to the application included the following programs:

"Let's Discuss It", Monday–Saturday, 10:20–10:30 a.m.
"Your Public Officials Speak", Monday–Saturday, 1:05–1:15 p.m.
"Your Mayor Speaks", Sunday, 3:05–3:20 p.m.
"Let's Discuss It", Sunday, 4:30–5:00 p.m.
"Your School Today", Monday–Saturday, 7:35–7:40 a.m.
"Our Schools", Sunday, 1:30–2:00 p.m.

53. The program logs submitted with the WYXI application for license renewal filed with the Commission in April of 1967 show that a program entitled "Music and Farm News" was broadcast on five days of the composite week from 12:15 to 1:00 p.m. This program is variously logged as Agriculture, Entertainment-Agriculture, and Entertainment. The logs do not show those portions of the programs devoted to agriculture or those portions devoted to entertainment. At one point in his testimony Frew did estimate that the program contained 75% agriculture and 25% entertainment. Later, however, Frew testified that WYXI has always broadcast "at least" ten minutes of agricultural programming per day. By assuming that the five "Music and Farm News" programs carried during the 1967 composite

week contained 3 minutes of commercials each quarter hour, as estimated by Frew in his testimony, it may be concluded that during that week WYXI broadcast a maximum of 2 hours and 15 minutes ($45-9=36\times.75=27\times5=135$ minutes) and a minimum of 50 minutes (10×5). Conversion of these figures into percentages for the 71 hours and 15 minutes that WYXI operated during the composite week shows that agricultural programming on WYXI accounted for between 1.16 and 3.15 percent of the station's total programming.

54. No educational or discussion programs were broadcast over WYXI during the composite week. The only programs broadcast during that week that could be placed in categories other than Entertainment, Religion, News and Agriculture were: (1) the Earl Nightingale "Our Changing World" program, a 3-minute, 40-second recorded program, which was broadcast at 7:55 a.m. and repeated at 4:55 p.m. on the weekdays of the composite week, and (2) "American Profile", a five-minute program broadcast once during the composite week. These two programs accounted for approximately 42 minutes of the station's total air time during the composite week.

55. Frew testified that the Nightingale program is difficult to categorize, but that it is "uplifting" without being religious and deals with "philosophies on life". In the logs analyzed by Athens the program was generally categorized as religious prior to 1968. Frew described "American Profile" as a program of interviews with people involved in "some kind of charitable work". Analysis of the special composite week logs for the 1967 WYXI renewal application endorses the fact reported in answer to paragraph 3A of the application—that the station carried no public affairs programming during that week. When the figures for agricultural programming set forth above are added to the approximately 42 minutes of "other" programming, it may be concluded that between 2.16% and 4.15% of WYXI's programming during the special composite week was "other" excepting religion, between 8% and 10% was religion, and 14.5% was news. Thus, the remaining 73.5% was entertainment, sports and commercial.

56. The only "other" or public affairs programs carried during the license period covered by the WYXI 1967 renewal application—but not reflected in the composite week logs—were: (1) a five-minute recorded program which the station received from the area's U.S. Congressman every other week; "School Menus", a five-minute program broadcast "daily"—but not listed on any of the composite week logs; (3) "Band Program", a 5–15 minute program broadcast at "various" times, about which Mr. Frew could not recall any information; (4) an "Ambulance Service" discussion program, 45 minutes in length, broadcast once on January 22, 1967; and (5) a program on the sales tax referendum broadcast once in 1966.

57. In Section IV of its application for renewal of license filed in May of 1967, 3 J's indicated that it would broadcast a minimum of one hour per week of public affairs programming. In the exhibit called for by paragraph 1(c) of Section IV–A of FCC Form 303, 3 J's stated as follows (Athens Ex. R–12):

"Having lived in the area for only a short time, the plans for future programming can only be determined by time and conditions. WYXI is always striving

to improve its facilities to improve the public needs: Expanded coverage into additional areas of the county, better service to the educational institutions. Future forums and discussions into pertinent matters. As the owners become more acquainted with the area the programming will be altered to suit the need."

58. In the 1967 composite week [1] no public affairs programs were broadcast. The Nightingale program was broadcast each weekday morning and repeated each weekday evening, and "American Profile" was broadcast on three occasions. The "Music and Farm News" program was broadcast on Tuesday, Wednesday and Thursday. The only discussion program carried during the calendar year 1967 was the discussion program concerning "Ambulance Service" described above.

59. The composite week program logs for 1968 indicate that "Lifeline", a recorded public affairs program, was broadcast on four days. The Nightingale program was broadcast twice each day in a manner similar to that described above, and "Music and Farm News" was broadcast as a 30-minute program on Monday, Wednesday and Friday, while remaining a 45-minute program on Tuesday and Thursday. The previously described "American Profile" was broadcast on two occasions and a program titled "U.S. Navy—Portraits and Patriotism" was also broadcast twice. This latter program is not otherwise described in the record but appears on the log as being recorded. "Pinpoint Weather" was carried on five days of the composite week. This program, although later classified as agriculture, was not classified at all on the 1968 logs. No other programs in categories other than entertainment, news, religion or sports were broadcast during this composite week.

60. During the 1969 composite week "Lifeline" was carried each day. In addition, "Periscope" was carried on two occasions, and "Music and Farm News" was carried for 15 minutes on Monday, 30 minutes on Tuesday, 30 minutes on Wednesday, 15 minutes on Thursday, and 30 minutes on Friday. A 5-minute Tennessee Educational Association program was carried on Wednesday. In the WYXI logs "Lifeline" is variously categorized as Religious, News-Instructional and Public Affairs. Frew described the program as a "patriotic" program produced in Dallas, Texas. "Periscope" is a recorded program produced in New York by the editors of *Newsweek* magazine. The Tennessee Educational Association Program is produced by that Association in Nashville. It usually involves an interview with a teacher or other person in the field of education. Although the only program broadcast during the 1969 composite week which could be characterized as public affairs was "Lifeline", 3 J's license renewal application indicates that 2 hours and 35 minutes of public affairs programming was broadcast. When the 3 minutes of commercial content are subtracted from each of the seven "Lifeline" programs, it can be seen that only 1 hour and 24 minutes of public affairs programming was broadcast during the composite week. The programs listed in this paragraph include all of the "public affairs" and "other" (exclusive of religion) programs broadcast during the composite 1969 week.

[1] The program log for Friday, January 6, 1967, was not available for analysis.

61. In his testimony Frew described only seven programs broadcast by WYXI from the inception of its service in October 1966 until January of 1970,[2] which could be described as local "Public Affairs" programs. These programs were the programs on ambulance service and the sales tax referendum mentioned above, two broadcasts (one 60 minutes, the other 45 minutes) of recordings of local State Road Commission hearings in 1969, two 35-minute programs by the candidates for Athens City Council in 1969, and a five-minute 1968 program produced by the Athens Committee for Legal Control on a "Liquor Referendum".

62. As noted above (par. 52), the 3 J's original application for WYXI proposed to carry regular programs titled "Let's Discuss It", "Your Public Officials Speak", "Your Mayor Speaks", "Your Schools Today" (daily), and "Our Schools" (Sunday). The school programs had been endorsed by the Dean of Tennessee Wesleyan College and the Superintendent of the Athens City Schools. The latter mentioned that "extra time would be needed for American Education Week and emergencies" (Athens Ex. R–11). The program survey Mr. Frew conducted confirmed the need for all of these programs. However, WYXI has never broadcast any of these programs in the almost four years it has been on the air. Frew explained that the failure to carry these programs stemmed from a "reluctance to perform" on the part of local officials in the south. However, he also indicated that all of his almost twenty years' experience in broadcasting had been in the south and that he had not noticed a "reluctance" on the part of public officials to participate on these programs when he conducted a programming survey in 1964. Frew admitted that he had not contacted the Mayor of Athens concerning the program "Your Mayor Speaks" before proposing the program in the application for WYXI's construction permit.

63. With regard to the failure of WYXI to carry the proposed school programs, Frew testified that WYXI had provided "community announcements" for the school and since about September of 1969 had carried school lunch menus. During the entire period WYXI has been on the air, the station has never broadcast a regularly scheduled public affairs program dealing with local problems.

64. Frew testified concerning "Jubilee", an entertainment program which he considered to be of service to the black community served by the station. However, Frew did not consult with any of the black community in his community survey for WYXI's 1970 license renewal application.

65. The methods by which the WYXI logs were kept made it virtually impossible to check over-commercialization on the basis of the NAB Code requirement of 18 minutes an hour, since on many occasions the commercial time was not logged at all, or when it was logged, the number of minutes of commercial time was omitted.

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[2] The Commission's decision ordering a hearing on the past broadcast record of 3 J's was released January 26, 1970. Under these circumstances, "no credit can be given" 3 J's for meritorious programming broadcast after release of the decision. *Jefferson Standard Broadcasting Co.*, 35 F.C.C. 430, 433, 24 RR 344, 344(e) (1963). See *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C. 2d 424, 427, 18 RR 2d 1901, 1906 (1970).

66. Despite the fact that Frew does not deny that there was a significant variance between the programming promised and that performed at WYXI, he does, in his proposed findings, press upon the Examiner certain findings that are apparently designed to speak in terms of extenuation. These have to do with what Frew must consider to be "substantial" compliance with the commitments made in his application. In a case such as this, variance from norm rather than adherence is a good deal more material since the holder of a government franchise is expected to conform to his commitments. The Examiner will, however, in what is, perhaps, a gesture of oversolicitude for the rights of Frew, adopt the findings thus advanced. They are set forth in the four paragraphs which follow.

67. In May 1967, WYXI filed an application for renewal of license for the ensuing three-year period. Despite the fact that certain programs were promised and not broadcast, the renewal was granted without question. In Section IV–A, paragraph 2, it replied that it would broadcast during a typical week of 71 hours, 10 hours and 36 minutes of news (14.5%), 1 hour of public affairs (.7%), and 9 hours and 10 minutes of "other" programs, exclusive of entertainment and sports (12.0%). WYXI did not promise to carry any local public affairs programs on a regular basis. In May 1970 it filed its application for renewal of license. In paragraph 3 of Section IV–A, it showed that during the composite week it broadcast 9 hours, 46 minutes of news (12.36%), 2 hours, 35 minutes of public affairs (3.16%), and 17 hours, 34 minutes of "other" programs, exclusive of entertainment and sports (22.11%).

68. In paragraph 4 of Section IV–A of the May 1970 renewal application, WYXI showed that it broadcast the following series of programs:

1. First Baptist Church, Athens, live remote service, 10:45 to 11:45 AM Sundays.
2. Temple Baptist Chuch, sermon, 8:00–8:30 AM, Sundays.
3. AOH Church of God, Athens (negro church), live remote service, 12:30–1:00 PM, Sundays.
4. Fairview Baptist Church, Athens, sermon from 6:05–6:30 AM, Monday–Friday.
5. Tabernacle of God, Riceville, sermon, from 6:30–6:45 AM, Monday–Saturday.
6. Pastor Hogan, First Bible Baptist Church, 10:05–10:30 AM, Monday–Friday.
7. Fred Wilson, local evangelist, 10:30–11:00 AM, weekdays.

69. In addition to the foregoing, the WYXI application showed that it also carried from time-to-time the following programs:

1. Tape of service presented during the Holy Week preceding Easter, 1:05–1:30 PM, Monday–Friday of Holy Week.
2. Easter Sunrise Service on Easter mornings from McMinn Memory Gardens.
3. On a delayed basis, the Thanksgiving evening service presented by the Athens Ministerial Association.
4. On December 23, 1969 from 3:00–3:45 PM, Christmas program by First Baptist Church Graded Choir.
5. On December 24, 1969:
(a) From 9:00–9:45 AM, First Baptist Church Cantata.
(b) From 1:00–1:30 PM, Christmas music from Fairview Baptist Church of Athens.
(c) From 2:00–2:30 PM, Choir of First Baptist Church of Riceville.

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(d) From 2:30–3:00 PM, program from East Athens Baptist Church.
6. Christmas programs on Christmas Day.
7. Local high school baseball games.
8. Indianapolis and other auto races (Rebel 400 mile race).
9. Annually, we broadcast salutes to graduates of local schools.
10. Local discussion programs as issues arise. (On occasion WYXI *has* carried local discussion programs.)

70. In the 1967 renewal application, WYXI promised that it would broadcast 100 non-commercial spot announcements. During the composite week of 1969, as shown by the May 1970 renewal, it broadcast 120 such announcements.

CONCLUSIONS

1. The foregoing facts lead to the following conclusions:

(a) On June 10, 1969, John Frew induced the addition of a false jurat to a letter which was later submitted to the Commission. The author of the letter neither appeared before the court clerk who signed the jurat nor did its author subscribe to the letter under oath. Frew's conduct in this matter violated 18 U.S.C. 1001. That provision of law reads as follows:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." [1]

(b) In April 1968 John Frew had a survey made on the popularity of his station with listeners in comparison with listeners' preference for other stations serving the same general area as that served by his station. The persons making the survey had no particular qualifications to perform the work. The technique employed, wholly unscientific, was not such as to promise accurate results. Nevertheless, with Frew's knowledge and cooperation, the results of that survey were widely published in the area of his station's operation. Frew's role in the matter runs afoul of a number of Commission pronouncements concerning the care with which survey material is to be used by broadcast licensees. In a Public Notice (FCC 63–544), released June 13, 1963, Pike and Fischer RR, Current Service*, Page 11:209, the Commission warned broadcast licensees against the improper use of broadcast ratings. There, the Commission stated that a licensee has "an obligation to take reasonable precautions to insure that a survey which he uses in an advertising campaign is valid (e.g., that it is properly conceived, reasonably free from bias, has an adequate sample)." In *Universal Communications of Pittsburgh, Inc.*, 17 RR 2d 1262, the Commission bluntly said, "Any practice intended to deceive or mislead advertisers or the public cannot be condoned."

(c) During July and August of 1967 Frew's station WYXI in the regular course of its operation broadcast material on behalf of the

[1] Because of the "knowingly and willfully" language of the law, the following finding should perhaps be added: On the basis of several days' association with him, the Examiner is perfectly willing to find that Mr. Frew is in full possession of his faculties and literate.

Dodson Insurance Agency without identifying the sponsor of that material. Failure to identify the sponsor violated Section 317 of the Communications Act and Section 73.119(c) of the Commission's rules. In pertinent part Section 317 provides:

> "All matter broadcast by any radio station for which any money, service, or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person. * * *"

(d) Facts set out in paragraphs 16–22 of the findings show that between 1959 and 1962, Frew was an active participant, along with Leslie E. Gradick, in four business associations that became holders of construction permits for radio stations at various locations in Georgia. In one of these, later to become WTGA, Thomaston, Georgia, Frew, together with his mother, held a 55% interest in the permittee. In another, later WISK, Americus, Georgia, Frew and Gradick were associated with two other men in a partnership which held the construction permit. In a third, WIYN, Rome, Georgia, Frew and his father were in partnership with Gradick. Frew and his father presumably together holding more than a 50% interest in the partnership. In a fourth, WPLK, Rockmart, Georgia, Frew and Gradick held equal interests in the permittee partnership. Frew and Gradick fell out in February 1961 and thereafter Frew had nothing to do with any of the permittee organizations. Frew's differences with Gradick were settled out of court after Frew sued Gradick. The settlement was dated in July of 1961. Assignment applications for the four stations in which Frew had an interest in the permittees were filed by Gradick on the following dates: WTGA—December 5, 1961; WISK—January 30, 1962; WIYN—June 8, 1962; WPLK—December 5, 1961. Athens Broadcasting in its proposed findings takes a good deal gloomier view of Frew's conduct in connection with the assignment of the four construction permits than does the Examiner. Athens takes the position that Frew should have, himself, promptly reported to the Commission his withdrawal from the four applicant groups and that his failure to do so placed him in the position of concurring in a scheme to withhold information from the Commission. Athens' position overstates the case. Frew became alienated and withdrew from his association with Gradick leaving the entire matter of dealing with the Commission to Gradick. While he was certainly responsible for reporting to the Commission his withdrawal from the partnerships wherein he and his parents held as much as 50% of the stock, the facts do not support a conclusion that he was involved in some shady conspiracy to hoodwink the Commission. The facts only show that Frew became completely estranged from Gradick and dumped the matter of what to do with the four construction permits into Gradick's lap. In doing this he placed himself in the position of having engaged in at least three reporting failures. But, in the judgment of the Examiner, that is the only dereliction that can be properly assessed against Frew for his conduct in the matter of the WTGA, WISK, WIYN and WPLK construction permits.

(e) The facts set forth in paragraphs 23 to 37 show a pattern of sloppy log keeping practices on the part of Frew at his station WYXI that extends from failure to initial corrections to failure to identify sponsorship or to log so as to make clear that commercial material broadcast was actually commercial in nature. These failings violate a number of Commission rules and reporting form requirements. Because they do, they constitute a substantial entry on the debit side of Frew's licensee qualifications ledger.

(f) The facts set forth in paragraphs 38 to 51 above leave little room for doubt that the $1000 cash giveaway promotion sponsored by the Athens merchants in February 1969 was, in some instances at least (where the tickets were not given away free), clearly a lottery. All of the basic elements of a lottery were then present—chance, prize, and consideration. Frew makes no bones about the fact that his station WYXI actively aided and abetted promotion of the scheme nor that he was bitterly critical editorially over his station of Athens Broadcasting (who believed the scheme to be a lottery), for not also supporting it. The broadcasting of lottery information is a violation of 18 U.S.C. 1304. That law reads:

> "Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1000 or imprisoned not more than one year, or both.
>
> "Each day's broadcasting shall constitute a separate offense. June 25, 1948, c. 645, 62 Stat. 763."

Frew is guilty here of engaging in an inadmissible broadcast practice. As against Athens' conduct concerning the matter, Frew comes off a bad second.

(g) In December 1964 Frew filed application for a construction permit for what later became station WYXI, Athens. In that application Frew made various statements as to how he would program the station. The same thing happened with his renewal application which was filed in May 1967. Many of the commitments made in the renewal application concerning programming were not carried out. Frew's conduct in this regard is squarely at odds with the doctrine announced in a recent Commission decision that among independent causes for refusal to renew station license is failure of the licensee to adhere to representations as to the manner in which the station is to be operated. See *Brandywine-Main Line Radio, Inc.*, 19 RR 2d 433.

2. As previously noted in an earlier decision, the Examiner recommended grant to Athens largely on the ground that its proposed operation would serve more people than would the proposal of 3 J's. The Review Board reversed. Unlike the Examiner, it found that grant to 3 J's would promote the Commission's diversification policy to the extent that a slight preference was warranted for 3 J's under that factor and that that preference, coupled with the solid preference 3 J's enjoyed because Frew would be fully integrated into the operation of the proposed station, tilted balance in favor of grant to Frew's 3 J's

Broadcasting Co. On remand, the Commission directed exploration into those areas concerning which conclusions have been drawn above. The Examiner was also, in substance, directed to correlate the latterly determined conclusions with those already made in earlier determinations and furnish a fresh appraisal of the merits of the two applications. Assuming that the Review Board was right and the Examiner was wrong and that 3 J's did enjoy a slight preference over Athens in the initial "go-around", it would shock credulity to arrive at any other ultimate conclusion than that the very substantial array of deviations from the norm of sound licenseeship that are outlined in paragraph one of these conclusions outweigh, on Athens' side, the comparatively negligible preferences awarded 3 J's by the Review Board.

3. In connection with the preferences awarded by the Review Board it may be well to bear in mind that the principal preference awarded by the Board that turned the scales in 3 J's behalf was the fact that Frew would be integrated into the day-to-day operation of the station. In light of Frew's record here it does not appear that that ground for preference has turned out to be a very good bet. It should also be noted that the difference between the Examiner's evaluation of the diversification criteria and the Review Board's weighing of that factor amounted only to the difference between dismissing a set of facts as *de minimis* and awarding a "slight" preference on the basis of them. The Board felt that grant of an FM permit to a daytime only AM station over a full time AM station in Athens, Tennessee, would have an appreciable effect in promoting the diversification of the media of mass communications in the United States. The Examiner did not.

Accordingly, IT IS ORDERED that, unless an appeal is taken from this Initial Decision to the Commission by a party or the Commission reviews the Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Athens Broadcasting Company, Inc. for a construction permit for a new frequency modulation broadcasting station in Athens, Tennessee, IS GRANTED, and the mutually exclusive application of John P. Frew and Julia N. Frew, d/b as 3 J's Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
THOMAS H. DONAHUE, *Hearing Examiner.*

F.C.C. 71D–32

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ATHENS BROADCASTING CO., INC., ATHENS, TENN. JOHN P. FREW AND JULIA N. FREW D.B.A. 3 J'S BROADCASTING CO., ATHENS, TENN. For Construction Permits	Docket No. 17617 File No. BPH–5668 Docket No. 17618 File No. BPH–5768

APPEARANCES

Lawrence J. Bernard, Jr., (Pierson, Ball & Dowd) on behalf of Athens Broadcasting Company, Inc.; *Samuel Miller*, on behalf of 3 J's Broadcasting Company; and *Gerald M. Zuckerman*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF HEARING EXAMINER ERNEST NASH*

(Issued June 8, 1971; Released June 10, 1971)

1. This proceeding involves the mutually exclusive applications of Athens Broadcasting Company, Inc., and John P. Frew and Julia N. Frew d/b as 3 J's Broadcasting Company (3 J's), each seeking authority to construct and operate an FM broadcast station on the only channel (No. 252A) assigned to Athens, Tennessee. The applications were originally designated for hearing by the Chief of the Broadcast Bureau in an Order released August 9, 1967, Mimeo. No. 4466 (32 F.R. 11712). This proceeding is now before the Review Board on an appeal from the cumulative Initial Decision of Hearing Examiner Thomas Donahue which would grant Athens application.

2. 3 J's filed a Petition to Enlarge Issues alleging that Athens had failed to adhere to the lighting requirements specified in the license of its standard broadcast station (WLAR) and that Athens had misrepresented the coverage of the station. On the basis of the allegations made by 3 J's, the Review Board adopted a Memorandum Opinion and Order which remanded the case for the purpose of hearing evidence on the following issues: (FCC 71R–12, released January 14, 1971).

"(a) To determine whether Athens Broadcasting Company Inc. has misrepresented the coverage area and contours of Station WLAR on its promotional maps distributed to the public and its potential and actual advertisers.

*This Supplemental Initial Decision is limited to the issues designated by the Review Board in its remand Order.

"(b) To determine whether Athens Broadcasting Company, Inc. has kept its tower lighted in accordance with the terms of its license and the Commission's Rules and Regulations.

"(c) To determine, in the light of the evidence adduced pursuant to the foregoing, the effect on Athens Broadcasting Company, Inc.'s basic and/or comparative qualifications to be a Commission licensee."

3. A prehearing conference was held on March 1, 1971, and a hearing was held on April 12, 1971. The record was closed on that date.

4. Athens is the licensee of standard broadcast station WLAR in Athens, Tennessee. Mr. William P. Atkins became an employee of the station in 1954 and assumed the position of General Manager in 1957. In 1962, after WLAR increased its power from 250 watts to 1,000 watts during daytime hours, Atkins designed a so-called rate card for Station WLAR.[1] The card he designed was about 8½ inches long and about 7 inches wide. The card [2] was divided in half, and, before distribution, was folded, producing two separate faces of about 8½ inches by 3½ inches, with various information concerning the station printed on each face. On the left-hand side of one face of the card was a circular map roughly 2½ inches in circumference. The map contained various placenames in the area near the station, a circle about 1¼ inches in diameter concentric with the outside edge of the map and a drawing of a radio tower at the center. In small type immediately below the map, "WLAR Coverage Survey" was printed, and in larger type below these words, "WLAR Coverage Area" appeared. Small legends were printed at the top of the map and at the top of the circle printed on the map; however, these legends could not be read with the naked eye. On the left-hand side of the face of the rate card containing the map, the words "Adult Radio for McMinn County" were printed in large type.

5. Atkins' reason for including the map on the rate card was to show the location of Athens and McMinn County in relation to the surrounding area. The map on the rate card was reproduced from a map which had been in the station's files when Atkins came to the station in 1954. The original map bore the date "Dec. 5th, 1946" and contained various information which either did not appear or was not legible on the rate card map. For example, the circle enclosing the original map was labelled "0.5 mv/m" and the small circle was labelled "1.0 mv/m". Wording on the original indicates that it was prepared by "A. G. Tanner Engineers Division" and that it depicted the operation of WLAR with 250 watts power. There is no evidence that the map was ever distributed to any person prior to 1962 and the only distribution since that time was on the rate card.

6. Atkins used the map because it was the only map he had available at the time. He did not consciously intend to make a showing of "coverage contours" on the rate card. In fact, he was not aware that the Commission recognized particular signal strength "contours" as the service

[1] The power increase took place on or about June 8, 1962. Atkins testified that he didn't know whether the rate card was issued at the time the station increased power but testified that the card was not used while the station operated with 250 watts during the daytime.

[2] Although the card had printing on both sides, only one was introduced into evidence.

areas for broadcast stations. When he took the map to the printer he did not know what the terms "0.5 mv/m" or "1.0 mv/m" meant. Although he had heard his engineer use such terms, they were "Greek" to him, and he had never requested an explanation or discussed the matter with his engineer. Atkins has a third-class operator's license from the Commission and does not perform engineering work at WLAR. Although other maps containing coverage contours may be in WLAR's files, Atkins does not understand engineering terms and did not feel it was necessary to compare the map on the rate card to any other map in his file.

7. From 1962 to the fall of 1970,[3] WLAR distributed rate cards with the map on them to potential advertisers. The station does not subscribe to audience surveys on a regular basis and no details covering such a survey were distributed with the rate cards. Atkins did not intend to represent to persons receiving the cards that the station "served" any particular area. Although he sells advertising for WLAR, Atkins never mentions the map on the rate card to potential or existing advertisers, and no one has ever questioned him concerning it. Atkins has never discussed the map on the rate card with other WLAR sales people and has not issued any instructions as to what the map depicts. Most of the advertisers in the area know how far WLAR reaches; they have radios in their cars and when driving to nearby areas listen to WLAR. Atkins testified that he had driven his car over most of the area depicted on the map while listening to the radio and he had been able to pick up WLAR. He has been in Cleveland, Tennessee, many times and has listened to WLAR on the radio there.

8. Station WLAR's license, issued in July 18, 1967, required it to maintain warning lights on its antenna in accordance with FCC Form 715. In compliance with this requirement, the station maintains 6 warning lights on its 180 foot tower. Two lights are installed approximately 60 feet from the ground; two more are installed at approximately 120 feet from the ground; and two lights are installed on top of the tower. Prior to September of 1970, Atkins had been aware for several years that Station WYXI in Athens was not obligated to install warning lights or paint its tower, and, after studying the matter, he had concluded that WLAR could also obtain such an exemption. He relayed this opinion to counsel who verified the fact that WYXI had obtained a waiver of the Commission's tower lighting and painting requirements. However, a request for deletion of these requirements from WLAR's license was not filed at that time.

9. On September 16, 1970, lightning struck the WLAR tower, extinguishing one of the lights at the 60 foot level of the tower and one of the lights at the 120 foot level. Both top lights and one light at each of the intervening levels remained operative. When this information was reported to Atkins, he searched his files to see if he could find the telephone number or the address of a person who would climb the tower and replace the lights. His search was unsuccessful. However, in 1963, WLAR had entered into a service contract with a Mr. Guy Drake for

[3] Atkins testified that after 3 J's filed its Petition to Enlarge the Issues in October of 1970, he blotted out the map on all rate cards to be distributed thereafter.

the regular painting and maintenance of the tower for a period of 12 years. The contract called for Mr. Drake to install new light bulbs when necessary. Drake fulfilled his part of the contract for almost three years, but then failed to perform for reasons unknown to Atkins. Some months prior to September, 1970, Mr. Drake had visited WLAR and requested work painting the station's tower or replacing warning lights. Mr. Drake had also indicated that his son-in-law was in the same business, and, in the event the station ever needed services of this kind, Drake requested that Atkins call him or his son-in-law in a suburb of Nashville, Tennessee. Atkins unsuccessfully attempted to telephone Drake in Franklin, Tennessee, on several occasions in September, 1970. He thought that Drake had given him a Franklin address, but later learned that Drake was in Madison, also a suburb of Nashville.

10. After the 3 J's Petition to Enlarge Issues was filed, Atkins called his attorney and pointed out that WLAR's tower was no higher than WYXI's tower and was about the same distance from the airport, yet WLAR was required to light its tower, while WYXI was not. After checking into the matter, the attorney called back about ten days later and indicated that if the station requested a waiver from the FAA, the FCC would delete the lighting requirement. After numerous telephone calls, Atkins talked to Mr. Don Ross in the Memphis, Tennessee, office of the FAA, who indicated that he did not believe that lighting of the WLAR tower was required by the FAA. He asked Atkins to submit certain information to him and request WLAR's tower marking and lighting requirements be discontinued. A letter requesting this relief was mailed on November 2, 1970. Mr. Ross responded by letter dated November 6, 1970, indicating that the requirements could be discontinued. On November 17, 1970, WLAR's attorney filed a request with the FCC to have the requirements deleted from WLAR's license, and this request was granted by telegraphic authority issued January 14, 1971. In light of the fact that a number of the tower lights were working and a person willing to climb the tower could not be found, Atkins determined that it was not necessary to replace the lights since Mr. Ross had confirmed that even an unlighted tower would not constitute a hazard to air navigation.

11. Atkins had also called the FAA on previous occasions when tower lights burned out and had been informed that such calls were unnecessary unless the top lights on the tower were inoperative.

12. WLAR's tower was painted in the late winter or early spring of 1970 by the Globe Tower Company, and all of the tower lights were replaced at that time. Atkins did not have the telephone number or the address of the Globe Tower Company and couldn't remember what city in Kentucky the company was located.

13. Atkins did not attempt to contact anyone other than Drake concerning replacement of the bulbs. Some years before September of 1970, an employee of the CATV system in Athens had indicated that he would do repair work on the towers; however, this man left the Athens CATV system about 1½ years ago and Atkins did not believe that the cable company had any other person who would climb the tower. WLAR had formerly employed a worker from the Athens

Power Company to replace its lights; however, after replacing some lights about 12 years ago, the employee said he was getting too old to climb towers and indicated that he would not do so again. Atkins did not call any other radio stations to inquire about a person to climb the tower. On previous occasions, the manager of the AM station in Etowah, Tennessee, had called for the name of a person to install tower lights.

14. Atkins testified that every 4–6 months, one or more people would drop by the station and inquire concerning the availability of work, painting or repairing the tower. It has been Atkins' experience that most of the people who come by are difficult to contact at later dates because they change their addresses or go out of business. WLAR does not have insurance that would cover a person climbing its tower.

15. From April 16, 1970, to January 14, 1971, WLAR continued to operate 4 of the 6 lights on its tower in accordance with its license. The remaining 2 lights were not replaced. After receiving the Commission's telegram, the station ceased to light the tower. Atkins testified that he did not recall anyone coming to the station from September through January seeking work on the tower. Atkins did not inform the FCC that his tower lights were out.

CONCLUSIONS

1. Issue (a) as designated by the Review Board in this remand proceeding requires a determination of whether Athens has misrepresented the coverage area and contours of WLAR. Unlike the situation in *Universal Communications of Pittsburgh, Inc.*, FCC 69–1397, 17 RR 2d 1262, reconsideration denied 21 FCC 2d 542, 18 RR 2d 491 (1970), there is not a scintilla of evidence to indicate that any member of the public or any advertiser was deceived or misled by the applicant. Thus, on this record, it must be determined that no misrepresentation took place.

2. The total lack of evidence indicating that anyone was misled is entirely consistent with all of the evidence which was received. Neither signal strengths nor contours were represented on the rate card map. The map itself is very small [1] and indistinctly printed, and, so far as the record indicates, has never even been the subject of inquiry or discussion between station representatives and advertisers or others. Atkins did not intend to represent the station's "coverage contours" on the map and he did not know what the terms "0.5 mv/m" or "1.0 mv/m" meant. Thus, all of the record evidence indicates that the applicant did not intend to misrepresent WLAR's coverage area, and there is no direct evidence that any person was in fact misled by the rate card map. Under these circumstances, it must be concluded that the evidence adduced under this issue does not affect the basic and/or comparative qualifications of the applicant to be a Commission licensee.

3. Issue (b). The Commission requires the illumination of radio towers "if and when in its judgment such towers constitute, or there

[1] The two sides (four "faces") of the rate card contain about 119 square inches of display space and the map covers roughly 6 square inches, or about five per cent of the total area of the card.

is a reasonable possibility that they may constitute, a menace to air navigation".[2] For several years, Atkins has had good reason [3] to believe that WLAR's tower did not constitute a hazard to air navigation even if unlighted. Within less than six weeks after two of WLAR's six lights had failed, Atkins had verbal confirmation of this fact from the FAA. To require full illumination of the tower under these circumstances would be an exaltation of form over substance clearly not justified in reaching a determination under the public interest standard.

4. The short delay between the date the lights ceased to function and the obtaining of FAA approval clearly did not affect the public interest. The top two lights on the tower, the most important [4] of the lights, remained in operation until the Commission authorized the station to discontinue lighting. The Commission does not require that licensees notify it when their tower lights fail and the record does not reveal any attempt by the applicant to conceal the matter. Under these circumstances where the licensee's actions constituted no more than a minor technical violation of a rule no longer being applied no "demerit" can be justified. For this reason, it must be determined that these matters do not affect the basic and/or comparative qualifications of the applicant to be a Commission licensee.

5. Even when considered in a manner most unfavorable to the applicant, the record on this remand presents no more than trifling examples of licensee misfeasance which should not be accorded any weight in determining which of two applicants will better serve the public interest.

Accordingly, IT IS DETERMINED that the evidence in this proceeding DOES NOT AFFECT the basic and comparative qualifications of Athens Broadcasting Company, Inc., to be a licensee of this Commission.

FEDERAL COMMUNICATIONS COMMISSION,
ERNEST NASH, *Hearing Examiner.*

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[2] Section 17.1 of the Commission's Rules.
[3] See proposed findings, paragraph 8.
[4] The Commission requires that notification be sent to the FAA *only* in the event a top light is extinguished. See Section 17.48(a) of the Commission's Rules.

F.C.C. 73R-243

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application for Renewal of License Filed by UNITED TELEPHONE CO. OF OHIO For Radio Common Carrier Stations KQA459 and KQA651 in the Domestic Public Land Mobile Radio Service at Lima, Ohio, and Bellefontaine, Ohio	Docket No. 19072 Files Nos. 548-C2-R-70, 549-C2-R-70

MEMORANDUM OPINION AND ORDER

(Adopted June 26, 1973; Released June 28, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. By Memorandum Opinion and Order released November 6, 1970, 26 FCC 2d 417, 20 RR 2d 602, the Commission designated for hearing the applications filed by United Telephone Company of Ohio (United) for renewal of its licenses for Stations KQA459 and KQA651 operating at Lima and Bellefontaine, Ohio, in the Domestic Public Land Mobile Radio Service. Based on allegations raised in a Petition to Deny filed by the Ohio Association of Radio Common Carriers, Inc. (RCC), the Commission specified issues to determine whether United, in connection with the rates charged for one-way radio paging services and for rates charged to miscellaneous common carriers and others for interconnection with its landline facilities, had engaged in any pricing practices which are: (a) anti-competitive or monopolistic; (b) in violation of any provision of the Communications Act or contrary to the public interest standards thereof; (c) in violation of any rule, decision or policy of the Federal Communications Commission. The Commission also named Carpenter Radio Company (Carpenter) as a party to the proceeding.[1] In her Initial Decision, FCC 72D-16, released March 2, 1972, the Administrative Law Judge resolved the issues in favor of United and granted its applications for renewal of license. Exceptions were filed with the Commission by Carpenter, RCC and the Chief, Common Carrier Bureau (Bureau). Based on the Presiding Judge's misinterpretation of the scope of the issue related to United's pricing practices for interconnection with its landline facilities, the Commission, by Memorandum Opinion and Order released February 5, 1973, 39 FCC 2d 845, 26 RR 2d 828, reopened the record and remanded the proceeding to the Presiding Judge.

[1] This action was taken by the Commission based on allegations contained in a petition filed by Carpenter.

2. Now before the Review Board is a "Petition To Enlarge Issues",[2] [3] filed by Carpenter on April 26, 1973, requesting that United's Mansfield, Ohio, application for additional facilities to operate on 152.60 MHz and for a change of antenna system for 152.78 MHz be made a part of the above-captioned proceeding. Although not entirely clear, petitioner also seems to request that the issues in the proceeding be enlarged to include a determination of whether United's pricing practices in Mansfield, Ohio, are anti-competitive.[4] Petitioner alleges that United's Mansfield proposal contains certain charges which are identical to those complained of in the petition to deny the applications under consideration here and which were found to be *prima facie* anti-competitive. Since the remand proceeding is related to interconnection charges with Radio Common Carriers, Carpenter maintains that United's Mansfield request for additional facilities, which it proposes to interconnect with its landline facilities, should be explored in this proceeding. Petitioner contends that United's proposed charges are in defiance of the Commission's *Guardband Proceeding* [5] which, according to movant clearly provides that wireline carriers make their facilities available to competing non-wireline carriers at costs identical to those they use in computing their own costs for providing competitive services.

3. In its opposition, the Bureau points out that United introduced cost studies in evidence under the issue related to United's one-way radio paging services (Issue 1) and that the Commission has now remanded this proceeding for similar evidence to be introduced with regard to United's interconnection practices. The Bureau argues that granting petitioner's request would lengthen, rather than expedite, the proceeding as ordered by the Commission, and would reopen Issue 1 even though there are insufficient allegations to do so. The Bureau further maintains that United's Mansfield application will be held in abeyance until the Commission has made a decision on the pending renewals, from which, according to the Bureau, there is sufficient evidence for the Commission to reach a decision regarding United's practice in Lima as well as elsewhere throughout the state. Carpenter's petition is also opposed by United.

4. Insofar as Carpenter requests consolidation of United's Mansfield application with the above-captioned proceeding, the request will be dismissed. The Commission, not the Review Board, has sole authority to consolidate applications. See Section 1.227 of the Commission's Rules; *A. V. Bamford*, 31 FCC 2d 701, 22 RR 2d 986 (1971); and *Chapman Radio and Television Company*, 1 FCC 2d 1158, 6 RR 2d 473 (1965). With respect to the apparent request for enlargement of the issues, petitioner's pleading is, as United correctly points out,

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[2] Although addressed to the Commission, petitions to enlarge issues are forwarded to the Review Board pursuant to Section 0.365(b)(1) of the Commission's Rules and Regulations.

[3] The Board also has before it for consideration: (a) opposition, filed May 1, 1973, by the Common Carrier Bureau; (b) opposition, filed May 7, 1973, by United Telephone Company of Ohio; and (c) reply to oppositions, filed May 23, 1973, by James M. and Miriam G. Carpenter, d/b/a Carpenter Radio Company.

[4] It is this underlying request which gives rise to the Board's consideration of this pleading pursuant to Section 0.365(b)(1).

[5] 12 FCC 2d 841 (1968), recon. den. 14 FCC 2d 269, affirmed *sub nom. Radio Relay, Inc.* v. *FCC*, 409 F.2d 322 (2d Cir. 1969).

grossly deficient in a number of respects, and, therefore, must be denied. As noted *supra*, this proceeding was designated for hearing by Order released November 6, 1970.[6] Petitioner has offered no explanation for waiting until this late date to ask the Commission to expand the scope of this proceeding to include United's Mansfield pricing policies.[7] In addition, petitioner's charges consist of general allegations without the necessary specifics to warrant the requested enlargement. Moreover, the allegations are not supported by affidavits from persons having personal knowledge of the facts alleged and, generally, the matters raised are not those of which official notice may be taken. See Section 1.229(c). Also see *RKO General, Inc.*, 34 FCC 2d 263, 24 RR 2d 22 (1972); and *Roberts Flying Service, Inc.*, 31 FCC 2d 777, 22 RR 2d 985 (1971).[8] Petitioner has also failed to comply with Section 1.44 which requires that requests to be acted on by different authorities—*i.e.*, the Commission, in the case of consolidations, and the Review Board, in the case of petitions to enlarge issues—be filed in separate pleadings.[9] The Board is not unmindful that petitioner is without legal counsel. Nevertheless, where, as here, the deficiencies are so numerous and substantial, the petition must be denied.[10]

5. Accordingly, IT IS ORDERED, That the request for consolidation contained in the petition to enlarge issues, filed April 26, 1973, by James M. and Miriam G. Carpenter d/b/a Carpenter Radio Company IS DISMISSED; and

6. IT IS FURTHER ORDERED, That, in all other respects, the petition to enlarge issues, filed April 26, 1973, by James M. and Miriam G. Carpenter d/b/a Carpenter Radio Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[6] Publication appeared in the Federal Register on November 13, 1970, 35 FR 17445.
[7] Even assuming that the filing of United's Mansfield, Ohio, application gave rise to the subject pleading, petitioner's request is still over five months late. In addition, petitioner's request is not even timely with respect to the Commission's remand Order, noted *supra*, assuming that that would have been an appropriate time to expand the proceeding based on additional evidence.
[8] Nor has the subject petition been verified, as required by Section 1.52 of the Rules. Also see *New York Telephone Co.*, FCC 72-340, 24 RR 2d 138.
[9] See *Better T.V., Inc. of Duchess County, New York* v. *New York Telephone Co.*, 19 FCC 2d 612, 17 RR 2d 311 (1969).
[10] In denying petitioner's request, the Board has taken into consideration the Bureau's representation that United's pending application will be held in abeyance until after the Commission has decided the instant proceeding.

F.C.C. 73-699

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF WESTERN RADIO CORP., RADIO STATION KTEO, SAN ANGELO, TEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 5, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated July 26, 1972, addressed to Western Radio Corporation, the licensee of Radio Station KTEO, San Angelo, Texas, and (2) the licensee's response dated August 18, 1972 to the Notice of Apparent Liability.

2. Station KTEO is licensed for operation on 1340 kilohertz with power of 1,000 watts daytime and 250 watts at night. Average sunrise times for June, July and August in Central Standard Time as set forth in the station license are as follows:

June, 5:30 a.m.
July, 5:45 a.m.
August, 6:00 a.m.

The Notice of Apparent Liability was issued in the amount of one thousand dollars ($1,000) for apparent willful or repeated violation of Section 73.87 of the Commission's Rules and failure to observe the terms of the station authorization, in that the station was operated from June 29 to August 29, 1971 with power of 1,000 watts one full hour prior to the authorized hours above set forth.[1]

3. The licensee responds to the Notice stating, in substance, that:

(1) KTEO is a small station in which all personnel have so many extra duties that some regulations invariably suffer unintentionally.

(2) The station had just received a power increase and the morning man who was unaccustomed to raising power at a given time assumed that the authorized time was local time.[2] The General Manager knew about the correct procedure, but was too busy to supervise operations and had no reason to believe that the power was not being properly raised. The station consulting engineer notified the station of the violations and they were immediately corrected prior to the inspection.

[1] The Notice was mailed to the licensee on July 27, 1972. Pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended no forfeiture liability shall attach for any violation occurring more than one year prior to the date of issuance of the notice of apparent liability. Therefore, in this proceeding the forfeiture is confined to those violations which occurred between July 27, 1971 and August 29, 1971.

[2] Actually the higher power of 1,000 watts for daytime operation was authorized on June 23, 1971.

(3) The station raised power mistakenly using Central Daylight Time (CDT) but also lowered power using the same time (CDT), and therefore did not benefit from the mistake.

Licensees will not be excused because their employees may have erred, since licensees are responsible for the acts of their employees, *Eleven Ten Broadcasting Corporation*, 32 FCC 706 (1962); nor will licensees be excused from past violations because of subsequent corrective action. *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). Licensees are expected to know and comply with the Commission's Rules. *J. C. Johnson, tr/as Lowndes County Broadcasting Co.*, 23 FCC 2d 91 (1970). The fact that the licensee signed on and off by central daylight time and thus may not have benefited from the violations does not justify or excuse the licensee from the possibility of harmful interference with reception of other stations which could have been caused by the unauthorized operation. The extended period of time during which unauthorized operation occurred, prior to receipt of notice from the station's consulting engineer, indicates that there was a continuing failure to exercise adequate supervision of the operation of the station. We find that the violations were repeated as above set forth and it is therefore unnecessary that we make an additional finding as to willfulness. *Paul A. Stewart*, FCC 63–411, 25 RR 375 (1963).

4. In view of the foregoing, IT IS ORDERED, That Western Radio Corporation, the licensee of Radio Station KTEO, San Angelo, Texas, FORFEIT to the United States the sum of one thousand dollars ($1,000) for repeated failure to observe the provisions of the station authorization and repeated violation of Section 73.87 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Western Radio Corporation, licensee of Radio Station KTEO, San Angelo, Texas.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*